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JOINT APPENDIX.

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 28, 1979.

Before

HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

ROSEMARY AUGUST,
Plaintiff-Appellee,
No. 78-2312 *vs.*
DELTA AIR LINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 95
Julius J. Hoffman, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-2312

ROSEMARY AUGUST,

Plaintiff-Appellee,

vs.

DELTA AIR LINES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 95—JULIUS J. HOFFMAN, *Judge*

ARGUED FEBRUARY 20, 1979—DECIDED JULY 6, 1979

Before SPRECHER, TONE and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* The issue presented in this appeal is whether the awarding of costs under Rule 68 of the Federal Rules of Civil Procedure is mandatory or discretionary if the final judgment obtained by plaintiff is not more favorable than the defendant's offer. In January 1977 the plaintiff-appellee Rosemary August, after receipt of a right to sue letter from the Equal Employment Opportunity Commission, initiated an action against the defendant-appellant Delta Air Lines, Inc., alleging, *inter alia*, that she was discharged from her position as flight attendant solely because she was black. The plaintiff sought reinstatement, back pay, benefits, other equitable relief, and

attorneys' fees and costs pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*

On May 12, 1977, after discovery had commenced, the defendant made an offer of judgment to plaintiff in the amount of $450, including costs and attorneys' fees accrued to date, pursuant to Rule 68 of the Federal Rules of Civil Procedure.[1] Plaintiff rejected the offer.

After an extended 25-day bench trial on the discrimination charge, the district court held that although the plaintiff had produced some evidence tending to show racial discrimination, she had failed to carry the burden of proving racial discrimination in accordance with *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977) and *McDonnell*

1. Rule 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Douglas Corp. v. Green, 411 U. S. 792 (1973).[2] Accordingly, the trial judge entered judgment in favor of the defendant and ordered each party to bear its own costs of litigation.

Pursuant to Rule 68 of the defendant then filed a motion for costs incurred after the date of the Rule 68 offer. The motion was denied.[3] We affirm and add only a few comments in

2. This court has affirmed the district court on the merits of the Title VII claim by a separate order issued this date pursuant to Circuit Rule 35.

3. In denying the motion, Senior District Court Judge Hoffman explained:

> While there is little authority on the point, this court is satisfied that in order to be effective, a Rule 68 offer must be made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable. . . .
>
> If the purpose of the rule is to encourage settlement, it is impossible for this court to concede that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.
>
> At the time this offer of $450 was made this litigation was approximately four months old. While the offer was intended to be received in full settlement of the parties' dispute, it is unlikely that such a small sum of money would even have fully satisfied the plaintiff's then incurred costs in attorneys fees.
>
> It must also be remembered that the plaintiff was given some encouragement as to the merit of her claim from the findings of the Equal Employment Opportunity Commission. Additionally, a successful litigant in a Title VII case is as a general rule entitled not only to reinstatement, but also to back pay plus costs and attorneys fees.
>
> Finally, while the court did ultimately find itself constrained to enter its judgment for the defendant, the court certainly did not find the plaintiff's claim to be wholly specious. In the opinion of this court and in the particular facts and circumstances of this case, an offer of only the sum of $450 could only have been effective were the plaintiff's claim totally lacking in merit or were there present additional factors which would mitigate in favor of the defendant.

(Footnote continued on next page.)

support of Judge Hoffman's holding. At the time the order was timely tendered, the plaintiff's alleged actual damages from the loss of her employment for the preceding 19 months exceeded $20,000, not including attorneys' fees and costs. Plaintiff also anticipated possible reinstatement as a flight attendant. Although plaintiff did not succeed in her discrimination claim, it was not frivolous. Plaintiff presented some evidence suggesting racial bias. The trial judge found that plaintiff, although guilty of poor and unacceptable performance, rendered good service on occasion. Her file revealed a record of some company awards and compliments from co-workers and passengers.

Against the general background, the Rule 68 offer of judgment of less than $500 before trial is not of such significance in the context of this case to justify serious consideration by the plaintiff. At oral argument the defendant urged that even an offer of $10 would have met the requirements of Rule 68 and served the purpose of shifting cost liability. If that were so, a minimal Rule 68 offer made in bad faith could become a routine practice by defendants seeking cheap insurance against costs. The useful vitality of Rule 68 would be damaged.[4] Unrealistic use of the rule would not encourage settlements, avoid protracted litigation or relieve courts of vexatious litigation.

(Footnote continued from preceding page.)

> For the reasons I have stated, the court concludes that the defendant's Rule 68 offer of May 12, 1977 did not constitute an effective offer.

4. The concept originated in state practice and was novel to the federal courts when the federal rules were adopted in 1938. C. Wright & A. Miller, *Federal Practice and Procedure*: Civil § 3001 (1973). The general principle was enunciated in *Crutcher v. Joyce*, 146 F. 2d 518, 520 (10th Cir. 1945), where the Tenth Circuit, sitting as an equity court and without referring to the rule, held that a plaintiff may be denied costs when he sues vexatiously after refusing an offer of settlement and then recovers practically the same sum previously offered. At least in cases such as that, Rule 68 provides a just and fair procedure to all concerned parties.

The defendant's arguments to the contrary that the allowance of costs is automatic and non-discretionary evidences that the issue is not free from doubt. The defendant points to the language of the rule where there is no specific requirement that the offer be "reasonable" or in "good faith." If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree "must" pay the costs incurred after the making of the offer. Fed. R. Civ. P. 68. The defendant contends that it is entitled to the benefit of the rule if the technical requisites of the rule have been observed.

The defendant claims that unless Rule 68 is rigidly followed the rule will overlap the trial judge's express discretion under Rule 54(d), which provides costs to the prevailing party unless the court directs otherwise. In spite of the force of these arguments, we are not persuaded.

Title VII embodies a basic national policy given a high priority by Congress and contains an authorization for the award of attorney's fees intended to encourage aggrieved individuals to seek redress for violations of their civil rights. *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). In considering the counsel fee provision under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), similar to the present provision of Title VII, 42 U.S.C. § 2000e-5(k), the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, explained that the counsel fee provision was "to encourage individuals injured by racial discrimination to seek judicial relief . . . ." 390 U.S. at 402. We do not propose to permit a technical interpretation of a procedural rule to chill the pursuit of that high objective.

The other cases which have considered this Rule 68 issue are limited. Defendant relies on *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974), and *Dual v. Cleland*, 79 F.R.D. 696 (D.D.C. 1978). In *Mr. Hanger* the plaintiff was unsuccessful in a patent infringement suit and was assessed with the defendant's defense costs. There the plaintiff argued that the Rule 68 offer was a "tactical sham," unreasonable and in bad faith. Although the court considered Rule 68 as mandatory, the district court nevertheless pointed out that the offer afforded the plaintiff substantially all the relief prayed for in the complaint and was not a sham.

In *Dual* the district court in a Title VII case ruled in favor of defendants after a trial on the merits. The court considered the application of Rule 54(d), which specifically provides for the exercise of discretion and Rule 68, which does not. Viewing the rule as automatic, the district court allowed costs to the defendant under Rule 68 but not under Rule 54(d). The issues of reasonableness and good faith apparently were not raised in *Dual* although the court noted that the plaintiff, albeit unsuccessful, had a good faith claim.

The plaintiff argues that her position is supported by *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661 (E.D. La. 1976), and *Hanna v. Crescent Ford Truck Sales, Inc.*, 404 F. Supp. 301 (E.D. La. 1975), but that support is at best only inferential.

For the considerations stated above, we believe that a liberal, not a technical, reading of Rule 68 is justified, at least in a Title VII case. We need not decide whether this same approach should be taken in other kinds of cases. In a Title VII case the trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks and expenses anticipated and involved in the case.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C.

[1] IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff,*
vs. No. 77 C 95
DELTA AIR LINES, *Defendant.*

TRANSCRIPT OF PROCEEDINGS

had in the above entitled cause before the HON. JULIUS J. HOFFMAN, one of the Senior Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, September 18, 1978, at the hour of 10:00 o'clock a.m.

Appearances:

Messrs. Glazer & Vance
170 W. Washington Street, Room 1125
Chicago, Illinois 60602

By: Ms. Susan Margaret Vance, appeared on behalf of the plaintiff;

Messrs. Schiff, Hardin & Waite
233 South Wacker Drive
Chicago, Illinois 60606

By: Mr. F. Allan Kovar, appeared on behalf of the defendant.

[2] The Clerk: 77 C 95 Rosemary August v. Delta Airlines, Incorporated, motion for hearing and decision on defendant's pending motion for costs pursuant to Rule 68.

Mr. Kovar: This, your Honor, is also the defendant Delta Air Lines' motion. As you recall there is currently a Rule 68 motion pending before the Court, which has been fully briefed.

And we have here, pursuant to Rule 15(d), requested the Court for a determination on this because of the pending appeal and because of the imminence of that appeal. As noted, the appellant's brief is due on the 29th of this month and our brief, of course, is due within thirty days thereafter. We do believe that a determination of the Rule 68 motion is relevant and significant to that appeal.

The Court: You style your motion, "Motion for a hearing and decision on defendant's pending motion for costs pursuant to Rule 68." Did I not see in the advertisement that Delta Air Lines, Incorporated, next to United, was the most solvent and most prosperous airline in the country and you are concerned about—

Mr. Kovar: I certainly hope so, your Honor.

The Court: And you want to hurry me into this decision on a small matter like this.

Mr. Kovar: No. We are most appreciative, your Honor, [3] of your own heavy schedule. The only reason we filed this motion was because of the pendency of the appeal and we believed the relevancy of this decision and the importance of it possibly to the appellate court.

The Court: Do you want to say anything?

Ms. Vance: No, your Honor, the plaintiff has nothing to say at this time.

The Court: There is now outstanding in this case a motion by the defendant Delta Air Lines for its costs of litigation. By the instant motion the defendant now seeks a ruling on that motion.

In its memorandum of decision in this case, the Court exercised its discretion under Rule 54(d) of the Federal Rules of Civil Procedure and ordered each party to bear its own costs of litigation. By the instant motion the defendant Delta Air Lines now moves, pursuant to Rule 68 of the Federal Rules of Civil Procedure, for an order directing the plaintiff to reimburse it for all costs incurred by Delta since May 12, 1977.

In support of this motion, the movant submits with the motion a copy of the offer of judgment made by Delta to the plaintiff on May 12, 1977. By that offer Delta offered to pay her $4,150.00 in full settlement of this litigation.

[1] Under Rule 68 of the Federal Rules of Civil Procedure at any time more than ten days before the trial begins a party defending against the claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or the effect specified in his offer with costs then accrued. An offer not accepted is deemed withdrawn and evidence thereof is not admissible, except in a proceeding to determine costs.

If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

The threshold question that must be resolved is whether a Rule 68 motion is proper in the face of an order by the Court pursuant to Rule 54(d) that each party must bear its own costs of litigation. This Court need spend but little time on that issue as it has already been fully considered and resolved in the recent case of Mr. Hanger, Incorporated v. Cut Rate Plastic Hangers, Incorporated, 63 FRD 607, (E. D. of N. Y. 1974).

There the Court held, and this Court must agree, that a party may recover its litigation costs under Rule 68, even though the Court has previously denied costs pursuant to Rule 54(d). In so concluding the Court does not, however, determine that the defendant Delta Air Lines is now entitled to recover its costs of

litigation pursuant to Rule 68 of the Federal Rules of Civil Procedure.

[3] While there is little authority on the point, this Court is satisfied that in order to be effective, a Rule 68 offer must be made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable.

The very purposes of Rule 68 of the Federal Rules of Civil Procedure, as well as the few authorities which have addressed the issue of this application, mandate this conclusion as stated in the Advisory Committee's Note to Rule 68, the purpose of this rule is "to encourage settlements and avoid protracted litigation." Or as stated in Staffend v. Lake Central Airlines, Inc., 47 F. R. D. 218 (N. D. Ohio 1969), "Rule 68 is intended to encourage early settlements of litigation. It is also intended to protect the party who is willing to settle from the burden of costs which subsequently accrue." 47 F. R. D. at Page 219.

If the purpose of the rule is to encourage settlement, it is impossible for this Court to concede that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.

The few cases which have addressed this aspect of Rule 68 support this conclusion. In Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (E. D. La. 1976), the Court, in deciding a request for attorneys fees, noted that under Rule 68 a [6] defendant "may offer what is really due and put the burden of costs on the plaintiff."

Additionally, in Honea v. Cresent Ford Truck Sales, Incorporated, 394 F. Supp. 201 (E. D. La. 1975) the Court stated that "if a reasonable offer is spurned, Rule 68 of the Federal Rules of Civil Procedure provides a manner in which a party can stop costs from accruing." 394 F. Supp. at Page 202. This requirement that the Rule 68 offer must be reasonable, at least arguably so, would also appear to be supported by Baldwin Cooke Company v. Keith Clark, Incorporated, 73 F. R. D. 564 (N. D. Ill. 1976).

Finally, the Court notes the decision of the United States Custom Court Judge in Mr. Hanger, Incorporated v. Cut Rate Plastic Hangers, Incorporated, 63 F. R. D. 607, (E. D. N. Y. 1974). In that case in awarding costs pursuant to a Rule 68 offer, Judge Reed rejected arguments that the offer there involved was "a sham." He also found that it was not made "in bad faith." Instead he concluded the offer was a "proper offer."

By the motion now before this Court, the Court must now decide whether in the specific facts and circumstances of this case the defendant's offer of May 12, 1977 in the sum of $450 sufficiently satisfied Rule 68 of the Federal Rules of Civil Procedure to warrant the [7] entry of the order now sought.

In the opinion of the Court it did not. For this reason the motion made pursuant to Rule 68 will be denied. At the time this offer of $450 was made this litigation was approximately four months old. While the offer was intended to be received in full settlement of the parties' dispute, it is unlikely that such a small sum of money would even have fully satisfied the plaintiff's then incurred costs in attorneys fees.

It must also be remembered that the plaintiff was given some encouragement as to the merit of her claim from the findings of the Equal Employment Opportunity Commission. Additionally, a successful litigant in a Title VII case is as a general rule entitled, not only to reinstatement, but also to back pay plus costs and attorneys fees.

Finally, while the Court did ultimately find itself constrained to enter its judgment for the defendant, the Court certainly did not find the plaintiff's claim to be wholly specious. In the opinion of this Court and in the particular facts and circumstances of this case, an offer of only the sum of $450 could only have been effective were the plaintiff's claim totally lacking in merit or were there present additional factors which would mitigate in favor of the defendant.

[8] For the reasons I have stated, the Court concludes that the defendant's Rule 68 offer of May 12, 1977 did not constitute an effective offer under that rule ... offer of settlement under that rule. For that reason, Mr. Clerk, the motion of the defendant Delta Air Lines, Incorporated for costs pursuant to Rule 68 of the Federal Rules of Civil Procedure will be denied. As previously ordered each party to this action will bear its own costs of litigation.

Mr. Kovar: Thank you, your Honor.

Ms. Vance: Thank you, your Honor.

* * * *

[9] IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff,* vs. DELTA AIR LINES, *Defendant.*	Civil Action No. 77 C 95

CERTIFICATE

I, Joan M. Unzicker, do hereby certify that the foregoing is a true, accurate, and complete transcript of the proceedings had in the above entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, in his courtroom at Chicago, Illinois, on September 18, 1978.

/s/ JOAN M. UNZICKER
Official Court Reporter
United States District Court
Northern District of Illinois

United States District Court
Northern District of Illinois
Eastern Division

Name of Presiding Judge: Honorable Julius J. Hoffman

Cause No. [illegible] Date September 19, 1979

Title of Cause: Rosemary August v. Delta Air Lines, Inc.

Brief Statement of Motion: Motion for Hearing and Decision on Defendant's Pending Motion for Costs Pursuant to Rule 68

Names and Addresses of moving counsel: E. Allan Kovar, Max G. Brittain, Jr., Schiff Hardin & Waite, 7200 Sears Tower, 233 S. Wacker, Chicago 60606

Representing: Defendant Delta Air Lines

Names and Addresses of other counsel entitled to notice and names of parties they represent: Carole K. Bellows, Bellows & Bellows, One IBM Plaza, Suite 33, Chicago; Susan M. Vance, Vance & Vance, 150 W. Washington, Chicago; Plaintiff Rosemary August

Defendant's motion for costs pursuant to Rule 68 is denied. Hoffman, S.J.

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Unpublished Order Not to be Cited
Per Circuit Rule 35

(Argued February 20, 1979)

July 6, 1979

Before

Hon. Robert A. Sprecher, *Circuit Judge*
Hon. Philip W. Tone, *Circuit Judge*
Hon. Harlington Wood, Jr., *Circuit Judge*

Rosemary August, *Plaintiff-Appellant*, v. No. 78-1933 Delta Airlines, Inc., *Defendant-Appellee*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 77 C 95. Julius J. Hoffman, *Judge*.

ORDER

Rosemary August initiated this Title VII action against defendant Delta Air Lines, Inc. alleging, *inter alia*, that she was discharged from her position as flight attendant solely because she was black. August sought reinstatement, back pay, benefits, other equitable relief and attorneys' fees and costs pursuant to

Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* After a bench trial the district court entered judgment in favor of the defendant. The plaintiff has appealed on the ground that the decision was unsupported by the evidence and that the district court improperly applied the law.[1] We affirm and add only a few observations to supplement the trial court's memorandum of decision and order entered on June 9, 1978.

Plaintiff offered some proof which suggested that she may have been subject to discrimination, but the evidence was superficial, incomplete, inadequate or otherwise defective. The evidence failed to establish that she was treated differently than similarly situated whites. The evidence from which it appeared that blacks on occasion may have received some preferential treatment was inconclusive in the absence of the complete files pertaining to the allegedly preferred employees and others similarly situated. The plaintiff, who had the burden of proving discrimination, selected only isolated instances for comparison of treatment. Complete personnel records of other flight attendants were not produced to help establish a basis for meaningful comparison of those employees similarly situated. *See Turner* v. *Texas Instruments, Inc.*, 555 F. 2d 1251, 1257 (5th Cir. 1977). The statistical evidence was incomplete and based only upon limited samples, which may or may not have truly reflected what they purported to show.[2] *See generally Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 620 (1974).

Regardless of the deficiencies of the plaintiff's evidence, the defendant strongly defended the action with a non-discriminatory

1. In conjunction with this order, an opinion has been published this date affirming the trial court's disposition of the Rule 68 offer of judgment issue in plaintiff's favor.

2. The Equal Employment Opportunity Commission interpretative manual, § 132.5(e), makes the elementary point that comparative evidence must be complete and relate to a sufficiently large sample of similarly situated Negroes and Caucasians so as to provide a meaningful basis for drawing a comparison.

explanation.[3] As a result of the charge of her fourth no show on December 16, 1974, the plaintiff was placed on indefinite suspension in accordance with the rules of Delta Air Lines. On January 2, 1975, the regional manager for Delta reviewed the plaintiff's file and informed her that she was on "last chance status" saying:

> Contents within your file revealed innumerable discrepancies ranging from no-shows, poor conduct while pass riding, lateness, co-worker write-ups and passenger complaints.
>
> Actions such as you've demonstrated will no longer be tolerated. You have been adequately warned and previously disciplined because of your continuing unsatisfactory job performance. By copy of this letter you are notified that this is your final warning and any future infraction will result in the termination of your employment with Delta Air Lines.

3. The following is a brief summary of the plaintiff's infractions while working with Delta Air Lines:

7/ 8/72	No show	4/30/74	Co-worker complaint
7/19/72	Co-worker complaint	5/ 5/74	Passenger complaint
7/21/72	No show	5/15/74	Discrepancy report
8/22/72	No show	6/ 7/74	Co-worker complaint
9/ 1/72	Co-worker complaint	6/21/74	Discrepancy report
9/16/72	No show	10/ 3/74	Discrepancy report
10/ 4/72	Discrepancy report	10/28/74	No show
10/ 8/72	Discrepancy report	11/19/74	Co-worker complaint
10/16/72	Two passenger complaints	11/24/74	Discrepancy report
		11/30/74	Co-worker complaint
12/ 72	Co-worker complaint	12/ 5/74	Discrepancy report
2/ 2/73	No show	12/16/74	No show
4/11/73	Discrepancy report	1/11/75	Passenger complaint
6/21/73	Discrepancy report	8/ 1/75	Co-worker complaint
7/17/73	Discrepancy report	8/11/75	Co-worker complaint
2/ 5/74	Discrepancy report	8/26/75	Discrepancy report
2/28/74	No show		

After the November 30, 1974, co-worker complaint about the plaintiff's lateness in boarding the plane, the plaintiff, for her third

(Footnote continued on next page.)

After that notification, another passenger complained about the plaintiff's service; two co-workers complained about her unprofessional conduct; and other discrepancy report for tardiness was lodged against her. On August 27, 1973 the plaintiff was asked to resign, and on September 3, 1973 was fired. The record supports considerable company forbearance without regard to the employee's race. Nonetheless, we do not view this case as frivolous.

We find no violation of the Title VII requirements. *Board of Trustees of Keene State College v. Sweeney*, U.S. (1978); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Affirmed.

(Footnote continued from preceding page.)

[illegible] in 60 days, was suspended for two days. Following the suspension of the supervisor, the plaintiff wrote separate letters to her supervisor and base manager apologizing for her lack of professionalism. The plaintiff also told her supervisor, "Getting suspended is exactly what I deserved[.] no one brought this upon myself but me. The only grateful I was suspended for 2 days and not three."

APPENDIX F.

In the United States District Court
For the Northern District of Illinois

ROSEMARY AUGUST, *Plaintiff*		
vs.		No. 77 C 95
DELTA AIR LINES, INC., *Defendant*		

MEMORANDUM OF DECISION AND ORDER

Bernard M. Decker, Senior United States District Judge. This is an action by the plaintiff Rosemary August to recover against her former employer, defendant Delta Air Lines, Inc. The plaintiff's complaint, as originally filed, was in two counts. In Count I, she seeks redress for employment discrimination allegedly practiced by Delta Air Lines. It is her position that in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, Delta subjected her to "... terms and conditions of employment different from those of her similarly situated Caucasian co-workers ..." and ultimately discharged her because she is a Negro. As relief, the plaintiff prays for reinstatement, back pay and such other equitable relief as may be proper. She also seeks an award of attorneys' fees and costs. These forms of recovery are expressly provided for in the Act. See 42 U.S.C. § 2000e-5.

Count II of the complaint was brought pursuant to the court's pendent jurisdiction. In that count, the plaintiff alleged that subsequent to her discharge by defendant, she sought employment with several companies, but "... has not been hired de-

spite her proud qualifications. Pleading further, the plaintiff states that she therefore believes that defendant has maliciously caused to be published to prospective employers libelous, slanderous, and defamatory statements concerning the plaintiff and having the effect of preventing her employment. For this alleged defamation, the plaintiff sought actual and punitive damages totalling $150,000.

In its answer, Delta denied all substantive allegations in the plaintiff's complaint. Delta also filed a motion for summary judgment as to Count II, arguing that there was no evidence to support the plaintiff's belief that she was being defamed. In support, deposition testimony from the plaintiff and the affidavit of one F. Kendall Allen, a Delta employee, were presented. The plaintiff admitted in her deposition that she was unable to cite any facts to support her belief she was being defamed. The affiant stated that no prospective employer inquiries regarding Rosemary August had ever been received by Delta. The plaintiff elected not to oppose the motion for summary judgment, and it was granted by the court. This case therefore proceeded to trial only on the plaintiff's allegations of race discrimination in violation of Title VII.

For cases for this court to have subject matter jurisdiction in this case certain procedural prerequisites must have been satisfied. These requirements are detailed in § 706 of the Act, 42 U.S.C. § 2000e-5. That section provides:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under this section by the Commission before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, [42 U.S.C. § 2000e-5(c)]

More importantly, under subpart (e) of § 706:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency, such charge shall be filed within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. [42 U.S.C. § 2000e-5(e)]

The purpose of the State agency filing requirement is to give available State agencies a prior opportunity to consider discrimination complaints. Compliance with this requirement is critical. *Love v. Pullman Co.*, 404 U.S. 522, at 524 and 526 (1972). In fact, because these requirements are jurisdictional, the plaintiff has the burden of establishing them by a preponderance of the evidence. A failure to do so will leave the court without subject matter jurisdiction. *Cutliff v. Greyhound Lines, Inc.*, 558 F. 2d 803, at 806 (5th Cir. 1977), *Reese v. Lafourche Gardens Co.*, 548 F. 2d 211, at 212 (7th Cir. 1977), *Ilchire v. Chicago and Eastern Illinois Railroad Co.*, 332 F. Supp. 601 (N.D. Ill. 1972).

At the trial of this cause, Rosemary August presented evidence of compliance with the procedural requirements of § 706. In its post trial brief, the defendant argued that the plaintiff had not sustained her burden of proof on this issue, and that this court therefore was without subject matter jurisdiction herein. In response to that argument, the plaintiff filed a motion by which she petitioned the court to "... reopen the proofs for the limited purpose of further establishing that all jurisdictional requirements ... have been met by plaintiff."

That motion was granted, and a special supplementary proceeding was held for the limited purpose of accepting additional evidence on the jurisdictional issue.

From all the evidence presented, the court finds that because the plaintiff has sustained her burden of establishing compliance with the procedural requirements of § 706 by a preponderance of the evidence, this court does have the requisite subject matter jurisdiction to decide the merits of this litigation. Rosemary August was employed as a flight attendant for Delta Air Lines, Inc. commencing November 22, 1971. Her employment was terminated on or about August 27, 1975. On April 7, 1975, and again on August 28, 1975, she filed charges of unfair employment practices against Delta with the Chicago District Office of the Equal Employment Opportunities Commission. On April 11, 1975, and again on August 29, 1975, the Commission deferred her charges to the Illinois Fair Employment Practices Commission, which is the State agency with authority to address her complaint. From the evidence adduced, the only reasonable conclusion to be reached is that the Fair Employment Practices Commission elected to take no action on Miss August's complaint. Therefore, acting pursuant to its statutory authority, the Equal Employment Opportunities Commission assumed jurisdiction over this matter. On January 4, 1977, it issued its Notice of Right to Sue. The plaintiff then filed her complaint with this court on January 11, 1977.

From these facts it is clear that the time requirements of § 706 have been satisfied. More importantly, this procedure by which the plaintiff filed her charges with the Equal Employment Opportunities Commission, which Commission then deferred those charges to the Illinois Fair Employment Practices Commission for its prior consideration, does comply with the State agency filing requirement of § 706. *Love* v. *Pullman Co.*, 404 U. S. 522 (1972). Therefore, all procedural requirements of Title VII have been satisfied. This court does have jurisdiction to decide the merits of this action.

In Count I of her complaint, Miss August has alleged that she was subjected to employment discrimination on the basis of her Negro race. A number of cases have addressed the proof requirements in private, non-class actions challenging employment discrimination. In the leading case of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), the Supreme Court was confronted with a situation where the complainant in a Title VII case alleged that his discharge and the general hiring practices of his former employer were racially motivated. In that case, the Court held that the initial burden of establishing a prima facie case of racial discrimination may be satisfied by a showing (i) that the plaintiff belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (ii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of equal qualifications. Assuming this burden of proof is discharged, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the individual's rejection. If that is done, the plaintiff then has the additional burden of proving the stated reason was just a pretext for a racially discriminatory decision. *Accord, Flowers* v. *Crouch-Walker Corp.*, 552 F. 2d 1277, at 1281 (7th Cir. 1977); *Kinsey* v. *First Regional Securities, Inc.*, 557 F. 2d 830, at 836 (D. C. Cir. 1977); *Sime* v. *Trustees of California State University and Colleges*, 526 F. 2d 1112 at 1114 (9th Cir. 1975).

While the Court in *McDonnell Douglas Corp.* v. *Green* presented this as one acceptable articulation of the specific elements necessary to establish a prima facie case, it specifically pointed out that the facts will vary in Title VII cases, so that its statement of the prima facie proof required should not be considered ". . . necessarily applicable in every respect to differing factual situations." *Id.*, at page 802, n. 13. The Court again addressed this point in *International Brotherhood of Teamsters*

v. *United States*, 431 U.S. 324 (1977), where it gave a more complete statement of the proposition:

> The importance of McDonnell Douglas lies not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on discriminatory criterion illegal under the Act. 431 U.S. at 358.

See also, McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, at 279, n. 6 (1976).

While this court does find the approach articulated in *McDonnell Douglas Corp. v. Green* to be instructive, it must conclude that the evidence presented here does not lend itself to the application thereof. But regardless of the approach adopted, what a plaintiff must establish as a minimum in a Title VII case is that he/she is a member of a protected class and that he/she was subjected to disparate treatment which was "racially premised." *International Brotherhood of Teamsters v. United States*, 431 U.S. at 335; *see also, Barnes v. St. Catherine's Hospital*, 563 F.2d 324 (7th Cir. 1977). These facts must be established by a preponderance of the net of all the evidence. *Barnes v. St. Catherine's Hospital, supra; Henry v. Ford Motor Company*, 553 F.2d 46 (8th Cir. 1977). In other words, in order to prevail, as a minimum, Rosemary August must establish by a preponderance of all the evidence that because she is a Negro, she was subjected to employment standards that were different from those imposed on similarly situated Caucasian flight attendants so that she was terminated while similarly situated Caucasian flight attendants were not. Viewing the evidence presented in this case against these requirements the court has no difficulty in reaching its decision.

1. This is not to say that a showing of a discriminatory *purpose* is required in Title VII cases. It is clear that there is no such requirement. *Washington v. Davis*, 426 U.S. 248 (1976); *United States v. City of Chicago*, No. 77-1171 (7th Cir. February 21, 1978).

Rosemary August is 27 years old; she is a member of the Negro race. She applied for a position as a flight attendant with Delta Air Lines by sending her employment application to their corporate offices in Atlanta, Georgia in October of 1971. Following an interview on November 3, 1971, the plaintiff was employed as a flight attendant and, after an initial training period, she was assigned to Delta's base at O'Hare International Airport in Chicago, Illinois. She worked as a flight attendant for Delta until her termination on August 27, 1975.

Delta Air Lines, Inc. is a national airline with its headquarters in Atlanta. It operates various bases throughout the country. The O'Hare base has a Base Manager who is in charge of all Delta flight attendants assigned to that base. Reporting directly to the Base Manager are supervisors. Each supervisor is charged with primary responsibility for a certain number of flight attendants.

From 1971 through October of 1973, the Base Manager at O'Hare Airport was June Kulencamp. Commencing in October of 1973, Nancy Severtsen filled that position. Throughout the period of Miss August's employment her immediate supervisor was Carolyn Powers.

These positions are important both because they are positions of authority and because responsibility for flight attendants' employment files is vested in the Base Manager and supervisors. The importance of this later factor lies in the fact that Delta employment decisions such as advancement, discipline and termination are, to a large extent, made based on what is contained in the flight attendant's file.

A termination decision at Delta normally requires first a determination by the supervisor and Base Manager that a flight attendant has failed to satisfy Delta standards for continued employment. Next, the employee file and a recommendation for termination are sent to the defendant's corporate headquarters

in Atlanta where they are reviewed by various management personnel. These people include a member of the defendant's staff of in house counsel, defendant's Equal Employment Manager, and the corporate Vice President in charge of personnel. On their concurrence, a Delta flight attendant is terminated.

In the case of Rosemary August these steps were carried out. After Nancy Severtsen and Carolyn Powers decided to recommend her termination, Miss August's records were transmitted to Atlanta. There, they were reviewed by Peter Caldwell, Administrative Assistant Personnel, Hunter Hughes, one of the defendant's in house counsel, Richard Ealey, Equal Employment Manager, and R. W. Allen, Vice President Personnel Benefits. Each of these individuals agreed with the original recommendation, and Rosemary August was terminated.

The decision to terminate was based on a determination of "poor job performance and attitude". The supervisory personnel involved based this conclusion on their findings that Rosemary August had committed a number of "no-shows" (failures to report for an assignment on time or other equally serious misconduct), that numerous co-worker and passenger complaints had been filed against her, that she was not properly performing her job and that she had been guilty of various Delta policy infractions.

The plaintiff has taken the position that Delta Air Lines' base at O'Hare International Airport had, between 1971 and 1978, a policy or practice of subjecting Negro flight attendants to discriminatory treatment, and that she was the victim of this discrimination. She argues that in the case of Negro employees in general and herself in particular, in making entries into flight attendant's files and in reaching employment decisions, the defendant held Negro attendants to higher or stricter standards than Caucasians. As the court has previously noted, entries in flight attendants' employment files are critical to the defendant's employment decisions. Therefore, a showing that the defendant was guilty of disparate treatment regarding file compilations would be highly probative of a Title VII violation.

In support of her allegations of disparate treatment, the plaintiff chose not to present for comparison the full employment files of Rosemary August and similarly situated Caucasian flight attendants. As will be more fully developed, she also elected to make only limited use of statistical data. Instead, her approach was primarily to present evidence to demonstrate that on particular occasions Caucasian flight attendants were treated a certain way while in similar situations either Rosemary August or one of Delta's other Negro flight attendants was dealt with more harshly.

The record presented in this case does establish that Rosemary August did perform her job on various flights in what one individual described as a "top notch" manner. During her career with Delta, she received a number of complimentary letters from passengers, which letters were placed in her file. She was also formally complimented by co-workers on occasion; those compliments were also made a part of her file. More importantly, she also received one Customer Service Award and two Feather-In-Your-Cap Awards. These are awards issued by Delta's corporate office for outstanding service by an employee. They are awarded to a flight attendant who has conducted himself or herself on a flight, or has in some other manner performed his or her duties in an exemplary manner. The Customer Service Award includes Delta Air Lines, Inc. stock certificates, recognition in the Delta Digest, a company newsletter, and a letter of appreciation from the Chairman of Delta's Board of Directors.

However, the record also contains evidence that establishes Mis August was capable of poor or unacceptable performance. Her file contains four "no show" citations; it is Delta's established policy that an employee may be subject to dismissal for four such infractions. Her file also contains a number of co-

worker and supervisor complaints. Co-workers found that the plaintiff could be offensive in her manner and uncooperative. Additionally, a number of letters of criticism were received from passengers. The plaintiff defendant against these complaints by claiming they were not factually correct. She also argued they were not adequately investigated by Delta. The court cannot respect failures to investigate complaints. Nevertheless, the complaints were filed, and they were received from a number of sources.

From all of this evidence, the court concludes that Rosemary August was capable of quality work performance, but was also guilty of carrying out her duties in a manner that was unacceptable to her employer. However, this is not the issue now before the court. What this court must now decide is whether the plaintiff has established by a preponderance of the evidence that two standards of performance were applied at Delta's O'Hare August base, and that Rosemary August, as a Negro, was a victim of this double standard. After a thorough review of the record in this case, the court must conclude that this burden has not been met.

The most probing evidence of disparate treatment presented in this case was a showing that in the period from 1972 through 1975, of a total of 38 flight attendants terminated, 10 (or 26%) were Negroes. And when the period is extended through 1976, 13 out of 38 (or 34%) were Negroes. Delta maintains a total staff of approximately 500 flight attendants at its O'Hare base. From the available evidence, approximately one fifth of that total, or approximately 100 of Delta's flight attendants, are Negroes.

The defendant has argued that where the statistical sample is small as it admittedly is the case here, the results obtained should be viewed as meaningless. In support, it cites, *inter alia*, *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, (1974); *Robinson* v. *City of Dallas*, 514 F. 2d 1271 (5th Cir. 1975); *Morita* v. *Southern California Permanente Medical Group*, 541 F. 2d 217 (9th Cir. 1976); *Ochoa* v. *Monsanto*, 473 F. 2d 318 (5th Cir. 1973). With this argument, the court does not agree.

In the recent Supreme Court case of *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), the Court did caution that "(c)onsiderations such as a small sample size may, of course, detract from the value of such evidence, [citing *Mayor of Philadelphia* v. *Education Equality League*, 415 U.S. 605, at 620-621 (1974)]. . . ." However, in that case the Court also noted that with proper caution, they can be of assistance to the fact finder in reaching his decision. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 339-340. Other cases are in accord; *see e.g.*, *Burns* v. *Thiokol Chemical Corporation*, 483 F. 2d 300, at 305-307 (5th Cir. 1973); *Equal Employment Opportunity Commission* v. *Eagle Iron Works*, 424 F. Supp. 240 (S.D. Ia. 1976).[2]

While these statistics do constitute evidence of disparate treatment because of the small numbers of employees involved relative to Delta's employment population, they cannot constitute conclusive proof thereof. See *International Brotherhood of Teamsters* v. *United States*, *supra*, and other cases previously cited herein. Rather, they must be considered along with all of the evidence in deciding this case.

As the court has previously stated, the main thrust of the plaintiff's case was a showing that in numerous specific situations Delta's supervisory personnel dealt more harshly with Negroes, both as to the disciplinary action taken and as to the

2. In reaching this decision to give weight to this statistical evidence presented by the plaintiff, the court has determined that it must reject plaintiff's argument that the proper measuring period is only 1975, the year she was terminated. In that year, 6 of 8 terminations involved Negroes. Clearly, 1975 cannot stand alone because the sample is too small, the measuring period is too short to be meaningful, and the results obtained are misleading.

entries made to the employees' files, than Caucasians. A review of every such incident is not practicable, and the court will not now attempt to do so.

However, one incident involving the plaintiff is sufficiently offensive to this court that individual recognition must be given to it. Based on little more than rumors or gossip, in April of 1973 defendant's then Base Manager, June Kulenkamp, determined to have Rosemary August examined for a venereal disease. Not only was the plaintiff not given any chance to confront the sources of Kulenkamp's information, she was not even told why she must submit to the medical examination until after the tests proved negative. In the interim, she was left to speculate on the need for this immediate physical examination. While the court believes the embarrassment and anxiety caused Rosemary August in this incident were unnecessary and the result of improper handling of the situation, it cannot find a racial motive therefor in the record. There simply was no showing that any other flight attendant, Negro or Caucasian, was subjected to treatment even remotely similar thereto.

By the remainder of her evidence, the plaintiff presented numerous other incidents where one employee, a Negro, was dealt with severely while in similar situations lesser measures were taken against Caucasian flight attendants. These included showings that Negroes were given "no shows", suspensions, and "discrepancy reports" (on the order of a warning notice) where in like cases, Caucasians were dealt with more tolerantly. However, both by its own evidence and during cross examination, the defendant established that on an equal number of occasions, Delta personnel showed favoritism to Negroes.

For example, the plaintiff established that for infractions such as tardiness, missing Delta training sessions, not being within ready telephonic reach while on reserve duty, substandard work performance, substandard service to passengers, offensive disposition, missing scheduled uniform and weight checks, and for

various other infractions, stern measures were taken against Negroes in general and Rosemary August in particular, while a more tolerant attitude was displayed toward Caucasians. Additionally, the plaintiff demonstrated that in certain cases, the benefit of any doubt was shown a Caucasian flight attendant but not a Negro. Finally, certain Caucasian flight attendants who were in jeopardy of losing their jobs were given more warnings and "last chances" than certain Negro attendants.

Standing unrebutted, this evidence would raise the necessary inference of racial bias. However, the evidence establishes that in equal numbers of cases, it was the Negro that benefited from a benevolent supervisor. Negroes were given discrepancy reports (warnings) instead of "no shows", or were excused from any discipline where in similar situations Caucasians were dealt with severely.

Rosemary August's own employment history includes such incidents. While her file contains four "no shows", it was established that she was properly subject to citation on at least three additional occasions. At other times, she received only verbal reprimands or was excused from any discipline when her conduct could under Delta policy have resulted in the imposition of stronger sanctions.

In reaching its conclusion in this case, the court must note certain discrepancies in the testimony. It is established Delta policy that an applicant disclose any prior employment within the airline industry. Rosemary August had previously been employed by United Airlines, Inc. when she applied for the position of flight attendant with Delta Air Lines. Her employment application fails to disclose this fact. While Miss August testified that she orally disclosed this experience during her job interview but was told "not to worry about it", the interviewer involved, Kendall Allen, denied this. Allen also testified, and it appears reasonable to conclude, that prior airline experience is an important element in evaluating a job applicant. Miss August also testified that in her opinion she had performed her duties

as a flight attendant in an acceptable manner and was not adequately apprised of dissatisfaction harbored by her supervisors. However, it was shown that in December of 1974, following a series of events culminating in a two day suspension, Rosemary August sent letters of apology to both Base Manager Severtsen and her immediate supervisor, Carolyn Powers, in which she acknowledged that she may have been guilty of substandard work performance and would endeavor to correct the situation. As is its duty, the court has taken these factors into account in determining the weight to be given to the evidence presented by the parties in this lawsuit.

From the evidence presented, it would appear that Delta Air Lines, Inc. may not be the most pleasant place to work. However, this trial record does not establish that its employment practices are racially premised. It further does not support the conclusion Rosemary August was subjected to disparate treatment, either in her employment or termination, because of the fact she is a Negro. For this reason, this court has concluded that it must enter its judgment in this case in favor of the defendant.

Accordingly, this case will be, and the same hereby now is dismissed with prejudice in favor of the defendant Delta Air Lines, Inc. and against the plaintiff Rosemary August. Each party will bear its own costs of litigation. No award of attorney's fees will be made in favor of either party.

This Memorandum of Decision and Order is intended to satisfy the provisions of Rule 52(a) of the Federal Rules of Civil Procedure which require the court to set forth its findings of fact and conclusions of law in all cases tried by the court sitting without a jury.

Dated at Chicago, Illinois, this 9th day of June, 1978.

APPENDIX F.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff,*	}	
vs.	}	No. 77 C 95
DELTA AIR LINES, INC., *Defendant*	}	

PROOF OF SERVICE OF OFFER OF JUDGMENT

County of Cook } ss
State of Illinois }

Max C. Brittain, Jr., being duly sworn, deposes and says:

1. I am attorney for the defendant in this action.

2. On May 12, 1977, Delta Air Lines, Inc., the defendant in this action, served upon plaintiff's attorney the annexed offer of judgment.

Max G. Brittain, Jr.,
One of the Attorneys for
Defendant Delta Air Lines, Inc.

Dated:

Notary Public

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROSEMARY AUGUST,
Plaintiff,
vs.
DELTA AIR LINES, INC.,
Defendant

No. 77 C 95

OFFER OF JUDGMENT

To: Carole K. Bellows
Bellows & Bellows
One IBM Plaza, Suite 1414
Chicago, Illinois 60611

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450 which shall include attorney's fees, together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damage.

Of Counsel:
Schiff Hardin & Waite
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
876-1000

Max G. Brittain, Jr.,
One of the Attorneys for
Defendant Delta Air Lines, Inc.

Sidney P. Davis
Hunter R. Hughes
Delta Air Lines, Inc.
Hartsfield Atlanta International Airport
Atlanta, Georgia 30320

APPENDIX G.

Original Rule 68, eff. September 16, 1938

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time.

As amended, eff. March 19, 1948

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

The fact that an offer is made but not accepted does not preclude a subsequent offer.

As amended, eff. July 1, 1966

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment. but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Delta Air Lines, Inc. ("Delta"), prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in these proceedings on July 6, 1979.

OPINIONS BELOW.

The Order of the Court of Appeals denying Delta's petition for rehearing and suggestion for hearing *en banc* is set forth in Appendix A to this Petition. The opinion of the Court of Appeals on the Rule 68 matter, reported as *August* v. *Delta Air Lines, Inc.*, 600 F. 2d 699 (7th Cir. 1979), is set forth in Appendix B to this Petition.

The unreported opinion of the United States District Court for the Northern District of Illinois on the Rule 68 matter is set forth in Appendix C to this Petition.

The separate unpublished opinion of the Court of Appeals on the merits is set forth in Appendix D to this Petition. The unreported opinion of the United States District Court for the Northern District of Illinois on the merits is set forth in Appendix E to this Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 6, 1979. Delta's timely petition for rehearing and suggestion for hearing *en banc* was denied by Order of the Court of Appeals entered on August 28, 1979. This Petition is filed within 90 days of said Order. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Rule 68 of the Federal Rules of Civil Procedure provides that the offeree who rejects an offer of judgment and does not receive a more favorable judgment "must pay" the costs incurred after the making of the offer. Delta made such an offer to a Title VII plaintiff whose complaint was ultimately dismissed. The court of appeals denied costs to Delta, holding that "a liberal, not a technical, reading of Rule 68 is justified, at least in a Title VII case." (600 F.2d at 702, A7). The questions thus presented are:

1. Whether the court of appeals erred in nullifying the clear and unambiguous mandatory imposition of costs under Rule 68?

2. Whether the court of appeals exceeded its authority by rewriting Rule 68?

Rule 54(d) of the Federal Rules of Civil Procedure provides that costs shall be allowed as of course to the prevailing party unless the court otherwise directs. The question thus raised is:

3. Whether the court of appeals abused its discretion by denying costs to the prevailing defendant under either its liberal reading of Rule 68 or the unchallenged reading of Rule 54(d)?

FEDERAL RULES INVOLVED.

Rule 54(d) of the Federal Rules of Civil Procedure for the United States District Courts provides in relevant part:

> "Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ."

Rule 68 of the Federal Rules of Civil Procedure for the United States District Courts provides:

> "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

STATEMENT OF THE CASE.

In January 1977 plaintiff sued Delta alleging that her termination from employment was discriminatorily motivated, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. §§ 2000e *et seq.* ("Title VII") and further alleging that Delta had defamed plaintiff. Delta denied such allegations but, nevertheless, in May, 1977 made an Offer of Judgment ("Offer") pursuant to Rule 68 of the Federal Rules of Civil Procedure ("Federal Rules") in the amount of $450 (App. F, pp. A33-34). Plaintiff failed to accept the Offer, and the cause was heard by District Court Judge Julius J. Hoffman between September 21, 1977 and October 31, 1977. The plaintiff admitted in a deposition that she knew of no facts to support her claim of defamation and Delta's motion for summary judgment was granted without opposition by plaintiff. Judgment on the Title VII claim was, after trial, entered for Delta. (App. E, pp. A19-32.) Although indicating that "the court has no difficulty in reaching its decision" (A24), the district court, without explication, ordered each party to bear its own costs of litigation. (A32.)

Thereafter, Delta brought to the court's attention the prior Offer and moved that plaintiff be ordered to pay all costs incurred after the Offer had been made. The District Court denied the motion on the basis that the Offer was not "arguably reasonable". (App. C, A11.)

Appeals were filed by both parties; plaintiff appealed on the merits, Delta appealed on the issue of the denial of costs. The court of appeals affirmed the judgment for Delta on the merits, commenting that plaintiff's evidence of discrimination was "superficial, incomplete, inadequate or otherwise defective." (App. D, A16.)

With respect to the Rule 68 matter, although stating that "the issue is not free from doubt" and "[i]n spite of the force of [Delta's] arguments" (600 F. 2d at 701, A5-6) the court of appeals held that in the context of a Title VII case a trial judge may exercise his discretion and refuse to award costs to the offeror defendant who prevails. (600 F. 2d at 702, App. B, pp. A2-7.) The court of appeals affirmed the trial court's order that each party bear its own costs.

Delta's timely Petition for Rehearing and Suggestion for Hearing En Banc was denied by the court of appeals on August 28, 1979. (App. A, p. A1.)

REASONS FOR GRANTING THE WRIT.

In a narrow sense, the propriety of the Seventh Circuit's extirpation of Rule 68 in the context of a Title VII case is at issue. In a broader sense, the efficacy and sanctity of a uniform system of rules governing the operation of our federal district courts is at issue.

On the surface, this case involves the proper interpretation and application of the cost-shifting provisions of Rule 68. The court of appeals, despite the mandatory, imperative language of the rule, held that policy considerations constrained it from following the rule as written, in the context of a Title VII case. Although aware that it was thus essentially duplicating the provisions of Rule 54(d), the court of appeals nevertheless subjected Rule 68's operation to trial court discretion. That decision alone, ignoring, as it does, the legislative history of the rule, tenents of statutory construction, and federal and state case law precedent, compels this Court's review.

The mischief of the court of appeals decision, however, cuts a deeper swath. By rewriting and thereby effectively nullifying the clear and unambiguous provisions of a Federal Rule, the court of appeals has usurped the power expressly conferred by Congress upon this Court, that of establishing general rules governing civil procedure in the federal district courts.

It might be urged that the instant case, involving "merely" an award of costs, is not of such magnitude as to require this Court's intercession. Delta submits, however, that the unbridled evisceration of the Federal Rules is more than a harmless transgression. As Justice Holmes trenchantly stated: "My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by . . . yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law." H. J. LASKI, COMMUNIST LEGAL PAPERS, 269 (1920).

The court of appeals in the instant case, by rewriting Rule 68 to fit its view of temporal needs, has perniciously torn at the fabric of our interwoven federal rules of procedure and thereby encroached upon the province of this Court and the Congress. Accordingly, because substantial questions affecting the proper interpretation and uniform application of the Federal Rules are involved, this Court should grant this petition for certiorari.

I

By the Imposition of Trial Court Discretion in Awarding Costs Pursuant to Rule 68 Offers, the Court of Appeals Has Emasculated Rule 68.

Rule 68 provides a mechanism by which a defendant may, at any time more than ten days before trial, offer to have judgment taken against it for a specified amount, together with costs then accrued. If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, Rule 68 directs that "the offeree *MUST* pay the costs incurred after the making of the offer." (Emphasis added.)

There is no dispute that all of the technical requirements prescribed in Rule 68 have been met in the instant case. Delta made a proper offer more than ten days before trial. (App. F, A 33-34.) Plaintiff did not obtain a judgment more favorable

than the rejected offer. Nevertheless, both the trial court and appellate court refused to award Delta its costs. Contrary to the unambiguous language of the Rule, and admittedly at odds with prior court decisions, the court of appeals adopted an amorphous standard by which offers under Rule 68 are to be viewed.[1] In so doing, the court of appeals has emasculated Rule 68.

A. Rule 68 Is Unambiguous and Mandatory.

The device of an Offer of Judgment was entirely new to the federal courts when it was promulgated and adopted in 1938 as Rule 68 of the then new Federal Rules of Civil Procedure. *See* Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 303 (1939). Offers of Judgment were well known and used in various state courts prior to 1938. Accordingly, the Advisory Committee Notes concomitant with Rule 68 in its initial introduction into the federal system contain no explication of the rule, but merely cite the state statutes of Minnesota, Montana and New York.[2] *See* 12 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001 (Rev. ed. 1973).

The Rule was amended in 1946 (eff. March 19, 1948). Of particular significance is the fact that the language requiring an unsuccessful offeree to pay costs was changed from "*shall* pay costs" to the present language of "*must* pay costs." (App. G,

1 The court of appeals stated standard is:

"In a Title VII case the trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case." (600 F. 2d at 702, A7)

2 A contemporaneous commentary on the newly enacted Rules stated that the provision directing the offeree to pay costs

"relieves the offering defendant of the burden of future costs, thereby constituting an inducement in the making of such offer." Dobie, *The Federal Rules of Civil Procedure*, *supra* at 304, n. 195.

A35). The Advisory Committee Notes to the 1948 amendments do not specifically discuss this change from "shall" to "must". However, in the Report of the Advisory Committee on the Proposed Amendments to the Rules of Civil Procedure (reproduced in 5 F. R. D. 433 (1946)) it is stated with respect to Rule 68 that "[defendant's] first and only offer will operate to save him the costs from the time of the offer if the plaintiff ultimately obtains a judgment less than the sum offered." 5 F. R. D. at 483. Further, a First Draft of the Advisory Committee, (submitted by Walter P. Armstrong as "Proposed Amendments To Federal Rules For Civil Procedures" and reproduced in 4 F. R. D. 124 (1946)) indicates that Rule 68 was changed to "remove ambiguities" and stated that the amended provision would provide that "no costs shall be recoverable by the offeree which were incurred after the making of an offer equal to or greater than the judgment finally obtained by the offeree, and that he should pay costs from the time of such offer." 4 F. R. D at 126. Additionally, in the final Recommendations of the Advisory Committee (submitted by Walter P. Armstrong and reproduced at 5 F. R. D. 339 (1946)), the changes in Rule 68 are discussed in the section titled "Ambiguities Resolved and Unresolved," wherein the sentence changing "shall" to "must" is quoted. 5 F. R. D. at 350. While the comments and intentions of the Advisory Committee are not binding, they are entitled to considerable weight in interpreting the Federal Rules. *See Mississippi Publishing Corp. v. Murphree*, 326 U. S. 438, 444 (1946). The Committee's intentions with respect to the operation of Rule 68 are clear; a discretionary operation was neither envisioned nor drafted.

1. "Must" Is Imperative.

The federal courts have had little occasion to decide what standards of statutory construction govern the use of the word "must". Ostensibly that is due to the infrequency with which

it is used.[3] In no case has "must" been interpreted as being discretionary. In *Berg v. Merchant*, 15 F. 2d 990 (6th Cir. 1926), *cert. den.* 274 U. S. 738 (1927) the Sixth Circuit interpreted the word "must" in the context of a wills statute and stated:

"[T]he word 'must' is so imperative in its meaning that no

3. Delta's scrutiny of the Federal Rules of Civil Procedure, for example, reveals that "must" is used but three times in addition to Rule 68:

Rule 14(a)

Otherwise he *must* obtain leave on motion to all parties. . . .

Rule 30(a)

Leave of court, granted with or without notice, *must* be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days. . . .

Rule 56(e)

When a motion for summary judgment is made and supported . . . an adverse party . . . *must* set forth specific facts showing that there is a genuine issue for trial.

The cases construing the above-referenced provisions have applied them in a mandatory, non-discretionary manner. *See generally, Rule 14(a): State Mutual Life Assurance Company v. Arthur Andersen & Co.*, 65 F. R. D. 518, 521 (S. D. N. Y. 1975); *Meilinger v. Metropolitan Edison Company*, 34 F. R. D. 143, 145 (E. D. Pa. 1963); 6 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 1454 (Rev. ed. 1973).

Rule 30(a): Brause v. Travelers Fire Insurance Co., 19 F. R. D. 231, 234 (S. D. N. Y. 1956); *Park & Tilford Distillers Corp. v. Distillers Co.*, 19 F. R. D. 169, 171 (S. D. N. Y. 1956); 8 WRIGHT & MILLER, *supra* at § 2104.

Rule 56(e): Adickes v. S. H. Kress & Co., 398 U. S. 144, 160 (1970); *Macklin v. Butler*, 553 F. 2d 525, 528 (7th Cir. 1977); *Felix v. Young*, 536 F. 2d 1126, 1135 (6th Cir. 1976); *Turoff v. May Co.*, 531 F. 2d 1357, 1362 (6th Cir. 1976); *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F. 2d 102, 109 (2d Cir. 1975); *Stevens v. Barnard*, 512 F. 2d 876, 878 (10th Cir. 1975); *Brown v. Ford Motor Co.*, 494 F. 2d 418, 420 (10th Cir. 1974); *Pace v. Southern Express Co.*, 409 F. 2d 331, 334 (7th Cir. 1969); *Town House, Inc. v. Paulino*, 381 F. 2d 811, 814 (9th Cir. 1967); *Liberty Leasing Co. v. Hillsum Sales Corp.*, 380 F. 2d 1013, 1015 (5th Cir. 1967); *Foy v. Norfolk & Western Railway Co.*, 377 F. 2d 243, 246 (4th Cir. 1967); *Fowler v. Southern Bell Telephone & Telegraph Co.*, 343 F. 2d 150, 154 (5th Cir. 1965).

case has been called to our attention where that word has been read 'may' ". 15 F. 2d at 991.

Moreover, the word "may" is used three times in Rule 68. It is a fundamental principle of statutory construction that "[w]here both mandatory and directory verbs are used in the same statute, . . . it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meaning." 2A SUTHERLAND STATUTORY CONSTRUCTION § 57.11 (4th ed. 1973).

Finally, this Court has recognized that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917). This Court has previously admonished appellate courts to refrain from the sort of judicial legislation here involved. In *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964), Justice Goldberg stated for the Court:

> "The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations." 379 U. S. at 121.

Where courts of appeals have chosen to ignore plain language and clear meaning, this Court has interceded. *See, e.g., Agosto* v. *Immigration & Naturalization Service*, 436 U. S. 748, 754-55 (1978).

The language of Rule 68 is clear and unambiguous. It is cast in mandatory, non-discretionary language and should be so interpreted. To do otherwise is to ignore the imperative "must", thereby eviscerating the Rule.

2. Progenitor State Laws Compel an Automatic Operation of Rule 68.

As previously noted, the original adoption of Rule 68 into the federal rules was based upon similar state court procedures. Although the Advisory Committee Notes reference only the

states of Minnesota, Montana and New York, several other states had established procedures for offers of judgment prior to 1938.[4]

A review of state court decisions rendered pursuant to the respective state procedures for offers of judgment, prior to the enactment of Rule 68, clearly reveals that a mandatory, non-discretionary imposition of costs under said procedures was upheld.[5]

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4. *See, e.g.* California—Cal. Civ. Proc. Code § 997 (West Supp. 1978); Colorado—*Yeager* v. *Campion*, 70 Colo. 183, 197 P. 898 (1921); Connecticut—*Wordin* v. *Bemis*, 33 Conn. 216 (1866); Indiana—*Prather* v. *Pritchard*, 26 Ind. 65 (1866); Kansas—*West* v. *Springfield Fire & Marine Ins. Co.*, 104 Kan. 157, 185 P. 12 (1919); Nebraska—*Wachsmuth* v. *Orient Ins. Co.*, 49 Neb. 590, 68 N. W. 935 (1896); Nevada—*Herring-Hall-Marvin Safe Co.* v. *Balliet*, 44 Nev. 94, 190 P. 76 (1920); Oregon—*Hammond* v. *Northern Pac. R. Co.*, 23 Or. 157, 31 P. 299 (1892); South Dakota—*Sioux Falls Adjustment Co.* v. *Penn Soo Oil Co.*, 53 S. D. 77, 220 N. W. 146 (1928); Wisconsin—*Newton* v. *Allis*, 16 Wis. 210 (1862).

5. For example, in *Ranney* v. *Russel*, 3 Duer 689 (Super. Ct. N. Y. 1854) the New York court interpreted section 385 of the New York Code, predecessor to the statute noted in the Advisory Committee Notes to Rule 68, and stated, in part: "If a defendant, . . . wishes to make an offer, which a plaintiff must accept at the peril of paying the subsequent costs, unless he recovers a more favorable judgment than the one offered. . . ." *Id.* at 690. In *Margulis* v. *Solomon & Berck*, 223 A. D. 634, 229 N. Y. S. 157 (Super Ct. N. Y. 1928) the court stated: "[I]f an offer properly made is not accepted, penalty is provided in the matter of costs after an offer has been tendered and refused, dependent on the final result." 229 N. Y. S. at 158.

In *Wachsmuth* v. *Orient Ins. Co.*, *supra*, the Nebraska Supreme Court held: "It is plainly the purpose of the statute to require in such case the plaintiff to bear his own costs, and also to bear the costs of defendant accruing after the offer." 68 N. W. at 937.

In *Herring-Hall-Marvin Safe Co.* v. *Balliet*, *supra*, the Nevada Supreme Court interpreted its statute and held: "[I]f the plaintiff fail to obtain a more favorable judgment, he shall not recover costs, but shall pay the defendant's costs from the time of the offer." 190 P. at 77.

In *Sioux Falls Adjustment Co.* v. *Penn Soo Oil Co.*, *supra*, the South Dakota Supreme Court stated: "As this [plaintiff's judgment] was less than the amount stated in the offer of judgment, defendant

(Footnote continued on next page.)

The conclusion is inescapable that if the drafters of original Rule 68 intended it to operate in the federal courts as it had in the various states, an automatic, non-discretionary operation was mandated.

3. Post Enactment Interpretation Compels an Automatic Operation of Rule 68.

While there have not been an abundance of cases decided in which the issue of mandatory versus discretionary application of Rule 68 has been an issue, the few available decisions support the mandatory approach.

Directly on point and at odds with the decisions below in the instant case, is the recent decision of *Dual* v. *Cleland*, 79 F. R. D. 696 (D. D. C. 1978). *Dual* involved a Title VII case in which the trial court ruled in favor of defendant and dismissed plaintiff's claim. As part of his dismissal order, Judge Richey ordered that each party bear its own costs. Thereafter, defendant (the Veteran's Administration, represented by the United States Attorney's office in Washington) brought to the court's attention the fact that a Rule 68 offer had been made. After contrasting Rule 54(d) with Rule 68, Judge Richey stated:

> "Rule 68 automatically charges the plaintiff with the defendant's costs incurred after an offer of judgment when the requirements of the rule are satisfied . . . The plain language of the rule eliminates the Court's discretion." 79 F. R. D. at 697.

In support of his conclusion, Judge Richey cited the only

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is entitled to its taxable costs in this court and in the trial court." 220 N. W. at 147.

Finally, in *Hammond* v. *Northern Pacific R. Co. supra*, the Oregon Supreme Court interpreted its offer of judgment provision (which stated that a plaintiff who failed to recover a more favorable judgment shall not recover costs from the time of the offer) to provide that: "[U]nless the plaintiff accept [the offer], or recover a more favorable judgment, the defendant is entitled to costs accruing subsequent to such offer." 31 P. at 301.

other federal decision directly on point, *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F. R. D. 607 (E. D. N. Y. 1974). 79 F. R. D. at 697.

In *Mr. Hanger*, a patent infringement suit, defendant had made a twenty-five dollar ($25.00) offer pursuant to Rule 68 before trial. After trial, the court ruled for defendant, concluding that plaintiff's patent was invalid. However, under the discretion permitted by Rule 54(d), costs were not awarded to defendant. Thereafter defendant brought to the court's attention its prior Rule 68 offer and requested all costs incurred after the making of the offer. Plaintiff argued that the awarding of costs is always a matter of the court's discretion, even in the presence of a Rule 68 offer. Judge Re held that:

> "Although there is no case directly in point, the express language of the rule . . . leave[s] no doubt that costs must be awarded once a proper offer of judgment has been made. It cannot be questioned that the rule itself is couched in mandatory terms. . . ." 63 F. R. D. at 610.[6]

Likewise, state courts interpreting identical or similar provisions as Rule 68, after its amendment in 1948, have had no difficulty finding an automatic, mandatory intendment to the

6. All other federal cases interpreting Rule 68, while not directly addressing the issues raised herein, have implicitly accepted the automatic, non-discretionary operation of Rule 68. *See, e.g., Truth Seeker Co., Inc.* v. *Durning*, 147 F. 2d 54, 56 (2d Cir. 1945); *Staffend* v. *Lake Central Airlines, Inc.*, 47 F. R. D. 218, 219-20 (N. D. Ohio 1969); *Maguire* v. *Federal Crop Insurance Corp.*, 9 F. R. D. 240, 242 (W. D. La. 1949), *rev'd in part on other grds.* 181 F. 2d 320 (5th Cir. 1950); *Nabors* v. *Texas Co.*, 32 F. Supp. 91, 92 (W. D. La. 1940); *see also* 12 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 3005 (Rev. ed. 1973). Further, in federal cases which have mentioned Rule 68 either in comparative contexts or without any explication of its operation, no indication is given therein of a discretionary application of said rule. *See, e.g., Mason* v. *Belieu*, 543 F. 2d 215 (D. C. Cir.) *cert. denied* 429 U. S. 852 (1976); *Thomas* v. *Trans World Airlines, Inc.*, 457 F. 2d 1053 (3d Cir. 1972); *Scheriff* v. *Beck*, 452 F. Supp. 1254 (D. Colo. 1978); *Read* v. *Baker*, 438 F. Supp. 737 (D. Del. 1977), *aff'd.* 577 F. 2d 728 (3d Cir.), *cert. denied*, 439 U. S. 869 (1978); *Perkins* v. *New Orleans Athletics Club*, 429 F. Supp. 661 (E. D. La. 1976); *Honea* v. *Crescent Ford Truck Sales*, 394 F. Supp. 201 (E. D. La. 1975).

operation of their respective rules. Thus, the following decisions support the mandatory imposition of costs as part of the operation of offers of judgment. *Miklautsch* v. *Dominick*, 452 P. 2d 438 (Alaska 1969) (Interpreting a provision identical to federal Rule 68, the Alaska Supreme Court stated: "All that is required to bring into play 'the offeree must pay the costs . . .' portion of Civil Rule 68 is a recovery which falls short of the offer of judgment . . . [A]ny other interpretation would be contrary to the clear meaning of the text of the rule, as well as in derogation of the rule's rationale." *Id.* at 440); *Pomeroy* v. *Zion*, 19 Cal. App. 3d 473, 96 Cal. Rptr. 822 (Cal. App. 1971) (Contrasting § 997 of the Code of Civil Procedure, which was worded similarly to Rule 68, with CCP § 998 which was broader in scope and couched in the permissive "may," the court stated: "Under CCP 997 costs from the date of offer are recovered as a matter of right, whereas under new CCP 998 costs . . . are recovered at the discretion of the court." *Id.* at 476 ff., 96 Cal. Rptr. at 824); *Sanservchan* v. *McGrath*, 320 So. 2d 476 (Fla. App. 1975) (Plaintiff argued that the terminology 'must pay the costs' of Florida Rule 1.442, RCP, should be interpreted as discretionary and not mandatory. Rejecting such argument, the court stated: "These arguments are not well taken . . . From a reading of federal cases [citing *Nabors* v. *Texas Co.*, *supra*], construing Rule 68 of the Federal Rules of Civil Procedure, which is identical to Rule 1.442, RCP, and from what we determine to be the intent of the Florida rule, we hold that the express language leaves no doubt that reasonable costs be awarded to the defendant . . . The rule itself, is couched in mandatory terms . . ." *Id.* at 478.) *Cowles* v. *Hoffman*, 19 Wis. 2d 236, 120 N.W. 2d 137 (1963) (The Wisconsin Supreme Court, citing an earlier case of *Nolop* v. *Spettel*, 267 Wis. 245, 64 N.W. 2d 859 (1954), stated: "[D]efendants might have offered judgment under sec. 269.02, Stats., in which case if the plaintiffs had rejected the offer and the plaintiffs failed to recover a more favorable judgment the defendants would have been entitled to full costs." 19 Wis. 2d at 238, 120 N.W. 2d at 138); *see also Krawiec* v. *Kraft*, 163 Conn. 445, 311 A. 2d 82 (1972); *Crudup* v. *Marrero*, 57 N.J. 353, 273 A. 2d 16 (1971); *Benda* v. *Fana*, 10 Ohio St. 2d 259, 227 N.E. 2d 197 (1967).

It is abundantly clear that the court of appeals herein ignored precedent and persuasive reasoning from all available sources when it chose to eliminate the "technical" requirement of the rule in the instant case. This Court should therefore review and redress the lower court's emasculation of Rule 68.

B. Rule 54(d) Has Been Effectively Duplicated by the Court of Appeals Redrafting of Rule 68.

The present "American" position regarding the litigation burdens of costs is the product of a gradual seven hundred year evolution. At the outset, the common law denied costs to both parties. BLACKSTONE'S COMMENTARIES 398-400 (Lewis ed. 1897). Although the losing party was liable to the Crown for at least a nominal sum, neither unsuccessful plaintiff nor defendant was taxed for costs payable to the prevailing opponent. Goodhart, *Costs*, 38 YALE L. J. 849, 852 (1929). In the early thirteenth century, the courts began to award to prevailing plaintiffs a reasonable sum as costs of prosecuting their rightful claims. Note, 49 YALE L. J. 699, 700 (1940). This practice was not a firm rule, however, until the Statute of Gloucester (6 Edw. I, c. 1 (1275)), wherein costs to the prevailing plaintiff were made mandatory. Over the next several hundred years, a series of enactments provided for costs to successful defendants in a variety of enumerated actions culminating in a 1607 statute (4 James I, c. 3) which gave costs to the prevailing defendants in all those actions where prevailing plaintiffs would be entitled to costs.

In the Supreme Court of Judicature Act of 1875, (38 and 39 Vict. c. 77 (1875)), Order 55 of the Rules of Court attached

so the Act provided that "the costs of an incident to all proceedings in the High Court shall be in the discretion of the Court." This short order was expanded in 1883 when the Rules of Court were substantially rewritten.

The above history of the imposition of costs in England pertains only to the practice at law. In equity, the giving of costs was entirely discretionary. *Jones* v. *Coxeter*, 2 Atk. 400 (1742). Therefore the merger of law and equity in the Judicature Act of 1875 and the attendant Rules of Court made no basic change in equity costs.

Prior to the promulgation of the Federal Rules of Civil Procedure, the American position regarding costs was that the prevailing party in an action at law was entitled to costs as of right. Justice Brandeis stated the principle:

> "While in equity proceedings the allowance and imposition of costs is, unless controlled by statute or rule of court, a matter of discretion, it has been uniformly held that in actions at law the prevailing party is entitled to costs as of right, except in those few cases where by express statutory provision or by established principles costs are denied."

In Re Peterson, 253 U. S. 300, 317-18 (1920).

The decision which most sharply illustrates the binding power of the rule giving costs to the winner in litigation was *United States* v. *Schurz*, 102 U. S. (12 Otto) 407 (1881). In that case judgment was obtained against Mr. Schurz for the manner in which he had discharged certain official duties as Secretary of the Interior. No intentional wrong was charged against him, and the lower court felt that it would be wrong to require him to pay costs out of his own pocket. An order was therefore made that each party should pay his own costs. The Supreme Court sympathized with the defendant but felt compelled to reverse the order:

> "[A] careful examination of the authorities leaves us no option but to follow the rule that the prevailing party shall

> recover of the unsuccessful one the legal costs which he has expended in obtaining his rights." 102 U. S. at 408.

As was stated above, in England equitable costs were always discretionary. That same status existed in American equity jurisdictions as well:

> "In actions at law costs follow the result as of course, but in equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case."

Kansas City Southern Railway Co. v. *Guardian Trust Co.*, 281 U. S. 1, 9 (1929).

Very much as law and equity merged in England in 1875, the two bars joined in this country in the Federal Rules of Civil Procedure with the result that in federal cases the trial court generally has broad discretion as to costs at law as well as in equity. 6 MOORE'S FEDERAL PRACTICE § 54.70[3] (2d ed. 1976).

While the use of discretion as a judicial safety valve to avoid abuses of the general rule is certainly desirable, objective standards would seem to be necessary to avoid abuses of the discretion. In England the Taxing Master under court rules may allow only those costs necessary for defending the rights of any party. Greenberger, *The Cost of Justice, An American Problem, An English Solution*, 9 VILL. L. REV. 400, 402 n. 9 (1964). In the United States, restraints on the court's discretion to levy costs have developed gradually through case law so that the discretion, in most circuits, is not unbridled.

Indeed, most circuits impose a requirement that the trial court articulate justification for not allowing costs to the prevailing party or there will be a finding of abuse of discretion.[7]

7. *See generally*, *Shima* v. *Brown*, 140 F. 2d 337 (D. C. Cir.) *cert. denied*, 318 U. S. 787 (1943); *Compania Pelineon de Naregacion* v. *Texas Petroleum Co.*, 540 F. 2d 53 (2d Cir. 1976) *cert.*

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By its untoward construction of Rule 68, therein granting broad discretion to the trial judge, the court of appeals in the instant case has not only rendered Rule 68 essentially duplicative of Rule 54(d) in a Title VII context, but has ignored the considerable historical evolution of rules with respect to costs. Rule 54(d) presumes, absent special delineated circumstances, that the prevailing party will be awarded costs. (*See* cases cited note 7, *supra*). Rule 68, on the other hand, rests not on distinctions of prevailing litigants, but on judgments ultimately rendered. It provides insurance against the obdurate plaintiff, and contains its own set of internal incentives. It offers protection to the defendant who is willing, before trial, to settle a case by giving plaintiff *more* than the court eventually decides plaintiff is due.

It is axiomatic that rules of the courts are not to be construed as individually isolated rules, but rather should be interpreted as a harmonious whole. *Nasser* v. *Isthmian Lines*, 331 F. 2d 124, 127 (2d Cir. 1964). Only a mandatory construction of Rule 68 ensures that it has significance independent of Rule 54(d), and that the two rules are allowed to achieve historical intendments.

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denied, 429 U. S. 1041 (1977); *ADM Corp.* v. *Speedmastic Packaging Corp.*, 525 F. 2d 662 (3d Cir. 1975); *Constantino* v. *American S. T. Achilles*, 580 F. 2d 121 (4th Cir. 1978); *Walters* v. *Roadway Express*, 557 F. 2d 522 (5th Cir. 1977); *Lichter Foundation, Inc.* v. *Welch*, 269 F. 2d 142 (6th Cir. 1959); *Popeil Brothers, Inc.* v. *Schick Electric, Inc.*, 516 F. 2d 772 (7th Cir. 1975); *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1 (7th Cir. 1949), *cert. denied*, 338 U. S. 948 (1950); *Subscription Television, Inc.* v. *Southern California Theatre Owner's Assoc.*, 576 F. 2d 230 (9th Cir. 1978).

II.

By Its Admitted Rewriting of Rule 68, the Court of Appeals Exceeded Its Authority.

The court of appeals held that it did "not propose to permit a technical interpretation of a procedural rule to chill" Title VII litigation. (600 F. 2d at 701, A6). By inferentially interpreting the word "must" to mean "may", if so required by the court, the court of appeals has rewritten Rule 68.

A. The Supreme Court Has Primary Responsibility for Promulgating the Federal Rules.

Congress, by the enactment in 1934 of the Rules Enabling Act, 28 U. S. C. § 723 b *et seq.*, (current version at 28 U. S. C. §§ 2071, 2072 (1970)), empowered the United States Supreme Court to promulgate rules of practice and procedure in the district courts. Upon taking effect, the Federal Rules of Civil Procedure acquired the force of federal statutes, controlling all district courts. *Sibbach* v. *Wilson & Company*, 312 U. S. 1, 13 (1941); *United States* v. *Brandt*, 8 F. R. D. 163, 164-65 (D. Mont. 1948); *C. J. Wieland & Son Dairy Products Co.* v. *Wickard*, 4 F. R. D. 250, 252 (E. D. Wis. 1945).

The proper construction and application of the Federal Rules has traditionally been a subject of great concern to this Court. *See, e.g., Schlagenhauf* v. *Holder*, 379 U. S. 104, 111-12 (1964); *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 256 (1957); *Los Angeles Brush Mfg. Co.* v. *James*, 272 U. S. 701, 706 (1927).[8] Indeed, this Court has manifested its responsi-

8. This Court, since the enactment of the Federal Rules in 1938, has interpreted and given guidelines for proper application of the vast majority of the extant rules. *See, e.g., Beacon Theatres* v. *Westover*, 359 U. S. 500 (1959) (Rules 1, 2, 18, 38, 42 & 57); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949) (Rules

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bilities with respect to the rules by allowing the extraordinary writ of mandamus to issue where a lower court has acted in derogation of the rules. In *Los Angeles Brush Mfg. Co.*, Chief Justice Taft, for a unanimous court, stated:

> "[W]e think it clear that where the subject concerns the enforcement of the . . . rules which by law it is the duty of this court to formulate and put in force, ... it may use its power of mandamus and deal directly with the district court in requiring it to conform to them." 272 U. S. at 706.

(Footnote continued from preceding page.)
3 & 4); *Hanna* v. *Plumer*, 380 U. S. 460 (1965) (Rule 4); *Jones & Laughlin Steel Corp.* v. *Gridiron Steel Co.*, 382 U. S. 32 (1965) (Rule 6); *Conley* v. *Gibson*, 355 U. S. 41 (1957) (Rules 8 & 12); *Southern Construction Co.* v. *Pickard*, 371 U. S. 57 (1962) (Rule 13); *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365 (1978) (Rule 14); *United States* v. *Hougham*, 364 U. S. 310 (1960) (Rules 15 & 16); *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964) (Rule 17); *Provident Tradesmen Bank & Trust Co.* v. *Patterson*, 390 U. S. 102 (1968) (Rule 19); *United States* v. *Mississippi*, 380 U. S. 128 (1965) (Rule 20); *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523 (1967) (Rule 22); *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974) (Rules 23 & 24); *Ross* v. *Bernhard*, 396 U. S. 531 (1970) (Rules 23.1, 38 & 42); *Robertson* v. *Wegmann*, 436 U. S. 584 (1978) (Rule 25); *Hickman* v. *Taylor*, 329 U. S. 495 (1947) (Rules 26-37); *Link* v. *Wabash Railroad Co.*, 370 U. S. 626 (1962) (Rule 41); *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227 (1964) (Rules 45 & 54); *Colgrove* v. *Battin*, 413 U. S. 149 (1973) (Rule 48); *Neely* v. *Eby Construction Co.*, 386 U. S. 317 (1967) (Rule 50); *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801 (1949) (Rule 51); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100 (1969) (Rule 52); *Mathews* v. *Weber*, 423 U. S. 261 (1976) (Rule 53); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (1946) (Rule 54); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970) (Rule 56); *United States* v. *Indrelunas*, 411 U. S. 216 (1973) (Rule 58); *Foman* v. *Davis*, 371 U. S. 178 (1962) (Rules 59, 60 & 73); *Mercer* v. *Theriot*, 377 U. S. 152 (1964) (Rule 61); *Granny Goose Foods, Inc.* v. *Teamsters Local No. 70*, 415 U. S. 423 (1974) (Rule 65); *United States* v. *Reynolds*, 397 U. S. 14 (1970) (Rule 71A); *Woltsohn* v. *Hankin*, 376 U. S. 203 (1964) (Rule 73); *Hill* v. *Hawes*, 320 U. S. 520 (1944) (Rules 77 & 79); *Pitchess* v. *Davis*, 421 U. S. 482 (1975) (Rule 81); *Snyder* v. *Harris*, 394 U. S. 332 (1969) (Rule 82); *United States* v. *Hvass*, 355 U. S. 570 (1958) (Rule 83); and *McCrone* v. *United States*, 307 U. S. 61 (1939) (Rule 86).

Accord, Schlagenhauf v. *Holder*, 379 U. S. at 111-12; *La Buy* v. *Howes Leather Co.*, 352 U. S. at 256.

The instant case represents the first substantive construction of the cost-shifting provisions of Rule 68 by a court of appeals. Its interpretation has resulted in its declination to follow the rule as written. While district and circuit courts unquestionably have the right to interpret the rules, they have no authority to extirpate and effectively nullify them. The court of appeals exceeded its authority and this Court should grant review to remedy that usurpation.

B. Redrafting of the Rules Should Be Done by Legislation, Not Judicial Interpretation.

Under the guise of interpretation, the court of appeals has admittedly redrafted Rule 68. Without regard to the policy arguments for or against a mandatory construction and operation of the rule in a Title VII context, the court of appeals has erroneously encroached upon the legislative function. This Court has consistently held that fundamental changes in the Federal Rules are subjects for rulemaking, not judicial decision. Thus, in *Harris* v. *Nelson*, 394 U. S. 286 (1969), this Court stated: "We have no power to rewrite the Rules by judicial interpretations." 394 U. S. at 298. And in *United States* v. *Robinson*, 361 U. S. 220 (1960), in a case involving interpretation of Federal Rules of Criminal Procedure 37(a)(2) and 45(b), this Court stated:

> "That powerful policy arguments may be made both for and against greater flexibility . . . is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision." 361 U. S. at 229.

Further, in *United States* v. *Isthmian Steamship Co.*, 359 U. S. 314 (1959), in response to the Government's arguments that the setoff and cross-libel procedures and rules operative in

admiralty proceedings were in need of revision, Chief Justice Warren declared for a unanimous court:

> "The Government contends that . . . the rule has become an anachronism and is out of line with the practice in specific courts and with the general rules of practice for federal courts. But it should be observed that where the procedure has been changed in this regard it has been the result of legislation or rulemaking and not the decisional process. . . . We think that if the law is to change it should be by rulemaking or legislation and not by decision." 359 U. S. at 422-23.

Rule 68 is an important and integral part of the rules governing litigants in federal courts. Although wide usage of the rule by defendants was not initially forthcoming,[9] it now appears to be gaining, particularly in suits similar to the instant one.[10] Moreover, several state legislatures have adopted identical provisions as Rule 68[11] and state courts are relying on the federal courts for guidance in applying their respective rules. *See, e.g. Hernandez* v. *Travelers Insurance Co.*, 331 So. 2d 329, 331 (Fla. App. 1976); *Santiesteban* v. *McGrath*, 320 So. 2d 476, 478 (Fla. App. 1975); *Davis* v. *Olson*, 513 P. 2d 475, 481 (Alaska 1973). This Court has in the past noted and accepted its important responsibility to provide the necessary guidance in the application of the Federal Rules. As stated by Justice Goldberg in *Schlagenhauf*:

> "[T]he issue concerns the construction and application of the Federal Rules of Civil Procedure. It is thus appropriate for us to determine on the merits the issues presented and to formulate the necessary guidelines in this area." 379 U. S. at 112.

9. *See* Note, *Rule 68: A "New" Tool For Litigation*, 1978 DUKE L. J. 889 (1978).

10. *See, e.g. Premier* v. *Carter*, 489 F. 2d 1377 (7th Cir. 1973); *Scharff* v. *Beck*, 452 F. Supp. 1254 (D. Colo. 1978); *Read* v. *Baker*, 438 F. Supp. 737 (D. Del. 1977), *aff'd*, 577 F. 2d 728 (3d Cir.), *cert. denied*, 439 U. S. 869 (1978); *Dual* v. *Cleland*, 79 F. R. D. 696 (D. D. C. 1978); *see generally* SCHLEI AND GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 1145-46 (1976).

11. *See, e.g.* Alaska R. Civ. P. 68; Ariz. R. Civ. P. 68; D. C. R. Civ. P. 68; Fla. R. Civ. P. 1.442; Nev. R. Civ. P. 68.

This Court should grant review and give the reasoned guidance required. That responsibility should not be abdicated and conferred upon a court of appeals. The conclusion of this Court in *United States* v. *Robinson*, 361 U. S. 220 (1960), is particularly compelling herein: "Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it." 361 U. S. at 230.

III.

Title VII Cases Do Not Warrant a Redrafting of Rule 68.

The court of appeals held that its decision was applicable only to Title VII cases. (600 F. 2d at 702, A7.) This result is contrary to clearly established precedent of this Court.

A. Exceptions to the Federal Rules Are Not Favored.

This Court has consistently held that in order to provide certainty to district courts and avoid confusion by litigants, a uniform application of the Federal Rules is required. *See, e.g. United States* v. *Indrelunas*, 441 U. S. 216, 219-21 (1973); *United States* v. *F. & M. Schaefer Brewing Company*, 356 U. S. 227, 230-31 (1958); *City of Morgantown* v. *Royal Insurance Co., Ltd.*, 337 U. S. 254, 258 (1949); *see also* cases cited note 8 *supra*.

More specifically, this Court has rejected arguments that particular kinds of cases warrant dispensations from the unambiguous requirements of the Federal Rules. Thus, in *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156 (1974), in a case interpreting the requirements of Rule 23(c)(2), the Court stated:

> "The short answer to these arguments is that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. . . . There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." 417 U. S. at 176.

And in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253 (1968), this Court explicitly rejected the suggestion that Rule 56(e) should, in effect, be read out of antitrust cases. 391 U. S. at 289-90.

Title VII claimants do not require the obsequiousness bestowed by the court of appeals in the instant case. If that result had been intended, Congress could have amended Rule 68 when it enacted the Civil Rights Act of 1964. It did not, therefore the subsequently enacted law should be interpreted compatibly with the Federal Rules. *See Untermeyer* v. *Fidelity Daily Income Trust*, 79 F. R. D. 36, 45 (D. Mass. 1978). Rule 68, in its plainly written terms, should apply equally to Title VII litigants. *See* SCHLEI & GROSSMAN, *supra* at 1146; *cf. Jones* v. *City of San Antonio*, 568 F. 2d 1224, 1226 (5th Cir. 1978) (Applying Rule 54(d) without exception for Title VII claimant); *Bormann* v. *Long Island Press Publishing Co.*, 379 F. Supp. 951, 954 (E. D. N. Y. 1974) (Applying Rule 23 without exception for Title VII claimant).

B. The Court of Appeals Ignored This Court's Decision in Christiansburg Garment Co. v. EEOC.

The court of appeals suggests that were it forced to follow the plain language of Rule 68, such an approach might "chill the pursuit" to seek judicial relief by individuals injured by racial discrimination. (600 F. 2d at 701, A6.) Delta submits that such fears, if relevant, are unfounded. A legitimate Title VII plaintiff is afforded vast protection without emasculating Rule 68.

If plaintiff prevails, costs *and* attorneys' fees are generally awarded. Civil Rights Act of 1964, *as amended*, 42 U. S. C. § 2000e-5(k).[12] This is clearly contrary to the normal operation of our legal system, but is based upon the desire to protect those wronged by discriminatory treatment in seeking redress. This Court has further protected Title VII plaintiffs by declaring that attorneys' fees will not be awarded to successful defendants unless the action brought is frivolous, unreasonable or vexatious. *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U. S. 412, 422 (1978). Of critical importance to the instant case, however, is the fact that in *Christiansburg*, this Court interpreted a statute which specifically provided for the allowance of attorney's fees *in the court's discretion*. Its opinion was intended to give guidance to district courts forced to exercise the discretion directed by the statute. This Court indicated that there were policy reasons for treating prevailing defendants differently than prevailing plaintiffs, thus the articulation of diverse standards with respect to awarding attorneys' fees.

Rule 68, however, expresses no latitude. It provides for no discretion, and needs no guided interpretation.[13] Its application is limited solely to defendants who offer to settle, prior to trial, in an amount in excess of that which plaintiff ultimately receives. It insures only costs, not attorneys' fees, and its operation is clearly mandatory. It is intended to protect, as it should, a defendant who is willing to settle a case by giving plaintiff *more* than the court eventually decides plaintiff is due. How can that possibly "chill" a legitimate plaintiff? It may force an honest appraisal of the worthiness of plaintiff's claim; but isn't that what the rule is intended to do?

Rule 68 fills a void. It fairly protects a defendant who wants to avoid litigation, and settle at an amount in excess of that due the plaintiff. It protects that defendant by insuring that at

12. "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." 42 U. S. C. § 2000e-5(k).

13. The drafters of the Federal Rules were well aware of the specific means for vesting lower courts with discretion. The explicit language "in its discretion" or "unless the court otherwise (directs) orders" is used in Federal Rules 6(b), 12(a), 15(a), 16, 24(b), 26(a), 26(b), 26(d), 29, 54(d), 58, 62(a), 62(b), 62(c), 63 and 71A(h).

least the costs of litigation, absent attorneys' fees, will be awarded. In the *Christiansburg* case this Court interpreted the Congressional instruction (that a court may grant attorneys' fees to the prevailing party in a Title VII case) to mean that a prevailing defendant may be granted attorneys' fees when the suit is frivolous or vexatious. This is a lower standard for the imposition of attorneys' fees than the common law standard of "bad faith". *See Christiansburg* v. *EEOC*, 434 U. S. at 417 n. 9. Apparently Congress and this Court did not feel that this lowered standard would "chill the pursuit" of legitimate Title VII plaintiffs.

Likewise, the intended mandatory operation of Rule 68 will not "chill" the legitimate Title VII plaintiff.

IV.

The Court of Appeals Ignored Its Own Standards in Denying Delta Costs.

Assuming, *arguendo*, that the court of appeals had some basis for revising Rule 68 and substituting its discretionary test, it nonetheless abused its discretion by not awarding costs to Delta.

In the first instance, wholly apart from the standards of Rule 68, are the prescriptions of Rule 54(d). As previously discussed (see Argument I, B, *supra*) Rule 54(d) embodies the long evolved principle that a prevailing party is entitled to its reasonable litigation costs. The Seventh Circuit has, in response to situations involving denial of costs to prevailing parties, referred to such denial as a "penalty" and has adopted a requirement that to extract such a "penalty" a trial court must indicate that defendant engaged in bad faith or deliberate confusion. *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11 (7th Cir. 1949), *cert. denied*, 338 U. S. 948 (1950). Furthermore, the Seventh Circuit has indicated that it is the

unsuccessful party's burden to show that the prevailing party should be penalized by a denial of costs. *Popeil Brothers, Inc.* v. *Schick Electric, Inc.*, 516 F. 2d 772, 776 (7th Cir. 1975). This latter requirement cannot be met by a mere showing that "the unsuccessful party was an ordinary party acting in good faith." *Id.*

In the instant case neither the trial court nor the court of appeals gave any indication that Delta acted in bad faith. To the contrary, although stating that the case was not frivolous (A18), the court of appeals held that plaintiff's evidence was "superficial, incomplete, inadequate or otherwise defective." (A16.) Similarly, the trial court stated that it had "no difficulty in reaching its decision." (A24.) Neither court suggested that Delta had done anything wrong, either in its treatment of plaintiff or in its conduct at trial. Accordingly, by the appellate court's own standards, Delta should have been awarded costs pursuant to Rule 54(d). To hold otherwise is clearly an abuse of discretion.

Secondly, even under the court of appeals newly articulated standard for the operation of Rule 68 in a Title VII case, Delta should have been awarded costs. The test is that the offer must have been made in good faith and have had some reasonable relationship (whatever that means) to the issues, litigation risks and expenses of the case. (600 F. 2d at 702, A7.)

Consider the untenable position Delta was placed in at the outset of the instant suit. It discharged a flight attendant who was not properly performing her job. Through no fault of its own, a lawsuit was not filed until a year and five months later; requesting back pay and reinstatement, and claiming damages for alleged defamation. Delta was convinced that it had violated no law and had not defamed plaintiff, yet it faced expensive and protracted litigation. Attempts to settle were unsuccessful; the plaintiff was obdurate. There could be no assurance, even when ultimately successful in defense, that Delta would recover court costs, much less attorneys' fees. Therefore,

based on its absolutely correct appraisal that it had done nothing wrong, it offered nevertheless to have judgment taken against it and actually pay a sum of $450 to a plaintiff *who deserved nothing*.

The gnawing question, left unanswered by the court of appeal's redrafting of Rule 68 and its imposition of a new test is, simply, what is a reasonable good faith amount which must be offered to someone who has not been wronged and deserves *nothing*? Under these circumstances, it is, we respectfully submit, an incredible determination that Delta's offer was not made in good faith.

The test used by the court of appeals is not supported by the clear language of Rule 68; but beyond that, the district court and court of appeals' determination is not supported by the test. This Court should grant review to redress this obvious abuse of discretion.

V.

CONCLUSION.

The court of appeals compounded failures herein, first by ignoring the unambiguous application of Rule 68, second by rewriting Rule 68 for Title VII plaintiffs, third by failing to follow its own redrafted rule, have brought to life Voltaire's admonition that: "I was never ruined but twice—once when I gained a lawsuit, and once when I lost one."

This Court should not countenance such an untoward result. Accordingly, a writ of certiorari should issue for review of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Appendices

APPENDICES.

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 28, 1979

Before

HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

ROSEMARY AUGUST,
Plaintiff-Appellee,

No. 78-2312 vs.

DELTA AIR LINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 95
Julius J. Hoffman, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above entitled cause by counsel for the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

In the United States Court of Appeals
For the Seventh Circuit

No. 78-1313

Rosemary Arneson,

Plaintiff-Appellee

v.

Delta Air Lines, Inc.,

Defendant-Appellant

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 77 C 93 — Joseph L. Hoffman, *Judge*.

Argued February 20, 1979 — Decided July 6, 1979

Before Wisdom,[*] Tone and Wood, *Circuit Judges*.

Wood, *Circuit Judge*. The issue presented in this appeal is whether the awarding of costs under Rule 68 of the Federal Rules of Civil Procedure is mandatory or discretionary if the final judgment obtained by plaintiff is not more favorable than the defendant's offer. In January 1977 the plaintiff-appellee Rosemary Arneson, after receipt of a right to sue letter from the Equal Employment Opportunity Commission, initiated an action against the defendant-appellant Delta Air Lines, Inc., alleging, inter alia, that she was discharged from her position as flight attendant solely because she was black. The plaintiff sought reinstatement, back pay, benefits, other equitable relief, and

attorneys' fees and costs pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

On May 12, 1977, after discovery had commenced, the defendant made an offer of judgment to plaintiff in the amount of $4430, including costs and attorneys' fees accrued to date, pursuant to Rule 68 of the Federal Rules of Civil Procedure.[1] Plaintiff rejected the offer.

After an extended 15 day bench trial on the discrimination charge, the district court held that although the plaintiff had produced some evidence tending to show racial discrimination, she had failed to carry the burden of proving racial discrimination in accordance with *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[2] Accordingly, the trial judge entered judgment in favor of the defendant and ordered each party to bear its own costs of litigation.

1 Rule 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

2 This court has affirmed the district court on the merits of the Title VII claim by a separate order issued this date pursuant to Circuit Rule 35.

Pursuant to Rule 68 the defendant then filed a motion for costs incurred after the date of the Rule 68 offer. The motion was denied.[3] We affirm and add only a few comments in support of Judge Hoffman's holding. At the time the order was timely tendered, the plaintiff's alleged actual damages from the loss of her employment for the preceding 19 months exceeded $20,000, not including attorneys' fees and costs. Plaintiff also anticipated possible reinstatement as a flight attendant. Although plaintiff did not succeed in her discrimination claim, it was not frivolous. Plaintiff presented some evidence suggesting racial bias. The trial judge found that plaintiff, although guilty of

3. In denying the motion, Senior District Court Judge Hoffman explained:

> While there is little authority on the point, this court is satisfied that in order to be effective, a Rule 68 offer must be made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable. . . .
>
> If the purpose of the rule is to encourage settlement, it is impossible for this court to concede that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.
>
> At the time this offer of $450 was made this litigation was approximately four months old. While the offer was intended to be received in full settlement of the parties' dispute, it is unlikely that such a small sum of money would even have fully satisfied the plaintiff's then incurred costs in attorneys fees.
>
> It must also be remembered that the plaintiff was given some encouragement as to the merit of her claim from the findings of the Equal Employment Opportunity Commission. Additionally, a successful litigant in a Title VII case is as a general rule entitled not only to reinstatement, but also to back pay plus costs and attorneys fees.
>
> Finally, while the court did ultimately find itself constrained to enter its judgment for the defendant, the court certainly did not find the plaintiff's claim to be wholly specious. In the opinion of this court and in the particular facts and circumstances of this case, an offer of only the sum of $450 could only have been effective were the plaintiff's claim totally lacking in merit or were there present additional factors which would mitigate in favor of the defendant.
>
> For the reasons I have stated, the court concludes that the defendant's Rule 68 offer of May 12, 1977 did not constitute an effective offer.

poor and unacceptable performance, rendered good service on occasion. Her file revealed a record of some company awards and compliments from co-workers and passengers.

Against that general background, the Rule 68 offer of judgment of less than $500 before trial is not of such significance in the context of this case to justify serious consideration by the plaintiff. At oral argument the defendant urged that even an offer of $10 would have met the requirements of Rule 68 and served the purpose of shifting cost liability. If that were so, a minimal Rule 68 offer made in bad faith could become a routine practice by defendants seeking cheap insurance against costs. The useful vitality of Rule 68 would be damaged.[4] Unrealistic use of the rule would not encourage settlements, avoid protracted litigation or relieve courts of vexatious litigation.

The defendant's arguments to the contrary that the allowance of costs is automatic and non-discretionary evidences that the issue is not free from doubt. The defendant points to the language of the rule where there is no specific requirement that the offer be "reasonable" or in "good faith." If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree "*must*" pay the costs incurred after the making of the offer. Fed. R. Civ. P. 68. The defendant contends that it is entitled to the benefit of the rule if the technical requisites of the rule have been observed.

The defendant claims that, unless Rule 68 is rigidly followed, the rule will overlap the trial judge's express discretion under Rule 54(d), which provides costs to the prevailing party unless

4. The concept originated in state practice and was novel to the federal courts when the federal rules were adopted in 1938. C. Wright & A. Miller, *Federal Practice and Procedure* Civil § 3001 (1973). The general principle was enunciated in *Crutcher v. Joyce*, 146 F. 2d 518, 520 (10th Cir. 1945), where the Tenth Circuit, sitting as an equity court and without referring to the rule, held that a plaintiff may be denied costs when he sues vexatiously after refusing an offer of settlement and then recovers practically the same sum previously offered. At least in cases such as that, Rule 68 provides a just and fair procedure to all concerned parties.

the court directs otherwise. In spite of the force of these arguments, we are not persuaded.

Title VII embodies a basic national policy given a high priority by Congress and contains an authorization for the award of attorney's fees intended to encourage aggrieved individuals to seek redress for violations of their civil rights. *Christianburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U. S. 412 (1977); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968). In considering the counsel fee provision under Title II of the Civil Rights Act of 1964, 42 U. S.C. § 2000a-3(b), similar to the present provision of Title VII, 42 U. S. C. § 2000e-5(K), the Supreme Court in *Newman* v. *Piggie Park Enterprises, Inc.*, explained that the counsel fee provision was "to encourage individuals injured by racial discrimination to seek judicial relief." 390 U. S. at 402. We do not propose to permit a technical interpretation of a procedural rule to chill the pursuit of that high objective.

The other cases which have considered this Rule 68 issue are limited. Defendant relies on *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F. R. D. 607 (E. D. N. Y. 1974), and *Dual* v. *Cleland*, 79 F. R. D. 696 (D. D. C. 1978). In *Mr. Hanger* the plaintiff was unsuccessful in a patent infringement suit and was assessed with the defendant's defense costs. There the plaintiff argued that the Rule 68 offer was a "tactical sham," unreasonable and in bad faith. Although the court considered Rule 68 as mandatory, the district court nevertheless pointed out that the offer afforded the plaintiff substantially all the relief prayed for in the complaint and was not a sham.

In *Dual* the district court in a Title VII case ruled in favor of defendants after a trial on the merits. The court considered the application of Rule 54(d) which specifically provides for the exercise of discretion and Rule 68 which does not. Viewing the rule as automatic, the district court allowed costs to the defendant under Rule 68 but not under Rule 54(d). The issues of reasonableness and good faith apparently were not raised in

Dual, although the court noted that the plaintiff, albeit unsuccessful, had a good faith claim.

The plaintiff argues that her position is supported by *Perkins* v. *New Orleans Athletic Club*, 429 F. Supp. 661 (E. D. La. 1976), and *Honea* v. *Crescent Ford Truck Sales, Inc.*, 394 F. Supp. 201 (E. D. La. 1975), but that support is at best only inferential.

For the considerations stated above, we believe that a liberal, not a technical, reading of Rule 68 is justified, at least in a Title VII case. We need not decide whether this same approach should be taken in other kinds of cases. In a Title VII case the trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C.

[1] IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff*,
vs.
DELTA AIR LINES, *Defendant*.
No. 77 C 95

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON. JULIUS J. HOLTMAN, one of the Senior Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, September 18, 1978, at the hour of 10:00 o'clock a.m.

Appearances:

Messrs. Glazer & Vance
179 W. Washington Street, Room 1125
Chicago, Illinois 60602
By: Ms. Susan Margaret Vance, appeared on behalf of the plaintiff,

Messrs. Schiff, Hardin & Waite
233 South Wacker Drive
Chicago, Illinois 60606,
By: Mr. E. Allan Kovar, appeared on behalf of the defendant.

[2] The Clerk: 77 C 95 Rosemary August v. Delta Airlines, Incorporated, motion for hearing and decision on defendant's pending motion for costs pursuant to Rule 68.

Mr. Kovar: This, your Honor, is also the defendant Delta Air Lines' motion. As you recall there is currently a Rule 68 motion pending before the Court, which has been fully briefed.

And we have here, pursuant to Rule 15(d), requested the Court for a determination on this because of the pending appeal and because of the imminence of that appeal. As noted, the appellant's brief is due on the 29th of this month and our brief, of course, is due within thirty days thereafter. We do believe that a determination of the Rule 68 motion is relevant and significant to that appeal.

The Court: You style your motion, "Motion for a hearing and decision on defendant's pending motion for costs pursuant to Rule 68." Did I not see in the advertisement that Delta Air Lines, Incorporated, next to United, was the most solvent and most prosperous airline in the country and you are concerned about—

Mr. Kovar: I certainly hope so, your Honor.

The Court: And you want to hurry me into this decision on a small matter like this.

Mr. Kovar: No. We are most appreciative, your Honor, [3] of your own heavy schedule. The only reason we filed this motion was because of the pendency of the appeal and we believed the relevancy of this decision and the importance of it possibly to the appellate court.

The Court: Do you want to say anything?

Ms. Vance: No, your Honor, the plaintiff has nothing to say at this time.

The Court: There is now outstanding in this case a motion by the defendant Delta Air Lines for its costs of litigation. By the instant motion the defendant now seeks a ruling on that motion.

In its memorandum of decision in this case, the Court exercised its discretion under Rule 54(d) of the Federal Rules of Civil Procedure and ordered each party to bear its own costs of litigation. By the instant motion the defendant Delta Air

Lines now moves pursuant to Rule 68 of the Federal Rules of Civil Procedure for an order directing the plaintiff to reimburse it for all costs incurred by Delta since May 12, 1977.

In support of this motion, the movant submits with the motion a copy of the offer of judgment made by Delta to the plaintiff on May 12, 1977. By that offer Delta offered to pay her $4,500.00 in full settlement of this litigation.

[1] Under Rule 68 of the Federal Rules of Civil Procedure at any time more than ten days before the trial begins a party defending against the claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or the effect specified in his offer with costs then accrued. An offer not accepted is deemed withdrawn and evidence thereof is not admissible, except in a proceeding to determine costs.

If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

The threshold question that must be resolved is whether a Rule 68 motion is proper in the face of an order by the Court pursuant to Rule 54(d) that each party must bear its own costs of litigation. This Court need spend but little time on that issue as it has already been fully considered and resolved in the recent case of Mr. Hanger, Incorporated v. Cut Rate Plastic Hangers, Incorporated, 63 FRD 607, (E.D. of N.Y. 1974).

There the Court held, and this Court must agree, that a party may recover its litigation costs under Rule 68, even though the Court has previously denied costs pursuant to Rule 54(d). In so concluding the Court does not, however, determine that the defendant Delta Air Lines is now entitled to recover its costs of litigation pursuant to Rule 68 of the Federal Rules of Civil Procedure.

[2] While there is little authority on the point, this Court is satisfied that in order to be effective, a Rule 68 offer must be

made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable.

The very purposes of Rule 68 of the Federal Rules of Civil Procedure, as well as the few authorities which have addressed the issue of this application, mandate this conclusion as stated in the Advisory Committee's Note to Rule 68, the purpose of this rule is "to encourage settlements and avoid protracted litigation." Or as stated in Stoffend v. Lake Central Airlines, Inc., 1 F.R.D. 218 (N.D. Ohio 1969), "Rule 68 is intended to encourage early settlements of litigation. It is also intended to protect the party who is willing to settle from the burden of costs which subsequently accrue." 47 F.R.D. at Page 219.

If the purpose of the rule is to encourage settlement, it is impossible for this Court to concede that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.

The few cases which have addressed this aspect of Rule 68 support this conclusion. In Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (E.D. La. 1976), the Court, in deciding a request for attorneys fees, noted that under Rule 68 a [a] defendant "may offer what is really due and put the burden of costs on the plaintiff."

Additionally, in Honea v. Cresent Ford Truck Sales, Incorporated, 394 F. Supp. 201 (E.D. La. 1975) the Court stated that "if a reasonable offer is spurned, Rule 68 of the Federal Rules of Civil Procedure provides a manner in which a party can stop costs from accruing." 394 F. Supp. at Page 202. This requirement that the Rule 68 offer must be reasonable, at least arguably so, would also appear to be supported by Baldwin Cooke Company v. Keith Clark, Incorporated, 73 F.R.D. 564 (N.D. Ill. 1976).

Finally, the Court notes the decision of the United States Custom Court Judge in Mr. Hanger, Incorporated v. Cut Rate Plastic Hangers, Incorporated, 63 F.R.D. 607, (E.D. N.Y.

1974). In that case in awarding costs pursuant to a Rule 68 offer, Judge Reed rejected arguments that the offer there involved was "a sham." He also found that it was not made "in bad faith." Instead he concluded the offer was a "proper offer."

By the motion now before this Court, the Court must now decide whether in the specific facts and circumstances of this case the defendant's offer of May 12, 1977 in the sum of $450 sufficiently satisfied Rule 68 of the Federal Rules of Civil Procedure to warrant the [7] entry of the order now sought.

In the opinion of the Court it did not. For this reason the motion made pursuant to Rule 68 will be denied. At the time this offer of $450 was made this litigation was approximately four months old. While the offer was intended to be received in full settlement of the parties' dispute, it is unlikely that such a small sum of money would even have fully satisfied the plaintiff's then incurred costs in attorneys fees.

It must also be remembered that the plaintiff was given some encouragement as to the merit of her claim from the findings of the Equal Employment Opportunity Commission. Additionally, a successful litigant in a Title VII case is as a general rule entitled, not only to reinstatement, but also to back pay plus costs and attorneys fees.

Finally, while the Court did ultimately find itself constrained to enter its judgment for the defendant, the Court certainly did not find the plaintiff's claim to be wholly specious. In the opinion of this Court and in the particular facts and circumstances of this case, an offer of only the sum of $450 could only have been effective were the plaintiff's claim totally lacking in merit or were there present additional factors which would mitigate in favor of the defendant.

[8] For the reasons I have stated, the Court concludes that the defendant's Rule 68 offer of May 12, 1977 did not constitute an effective offer under that rule—offer of settlement under that rule. For that reason, Mr. Clerk, the motion of the defendant

Delta Air Lines, Incorporated for costs pursuant to Rule 68 of the Federal Rules of Civil Procedure will be denied. As previously ordered each party to this action will bear its own costs of litigation.

Mr. Kovar: Thank you, your Honor.

Ms Vance: Thank you, your Honor.

* * * * *

[9] IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff,* vs. DELTA AIR LINES, *Defendant.*	Civil Action No. 77 C 95

CERTIFICATE

I, Joan M. Unzicker, do hereby certify that the foregoing is a true, accurate, and complete transcript of the proceedings had in the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, in his courtroom at Chicago, Illinois, on September 18, 1978.

/s/ JOAN M. UNZICKER
Official Court Reporter
United States District Court
Northern District of Illinois

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Julius J. Hoffman

Cause No. 77 C 95 Date September 18, 1978

Title of Cause—Rosemary August v. Delta Air Lines, Inc.

Brief Statement of Motion—Motion for Hearing and Decision on Defendant's Pending Motion for Costs Pursuant to Rule 68.

Names and Addresses of moving counsel—E. Allan Kovar, Max G. Brittain, Jr., Schiff Hardin & Waite, 7200 Sears Tower, 233 S. Wacker, Chicago, 60606.

Representing—Defendant Delta Air Lines.

Names and Addresses of other counsel entitled to notice and names of parties they represent—Carole K. Bellows, Bellows & Bellows, One IBM Plaza, Suite 14, Chicago; Susan M. Vance, Glazer & Vance, 179 W. Washington, Chicago; Plaintiff Rosemary August.

Defendants motion for costs pursuant to Rule 68 is denied Hoffman S. J.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Unpublished Order Not to be Cited
Per Circuit Rule 35

(Argued February 20, 1979)

July 6, 1979.

Before

HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

ROSEMARY AUGUST,
Plaintiff-Appellant,

vs.

No. 78-1933

DELTA AIRLINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 95

Julius J. Hoffman, *Judge.*

ORDER.

Rosemary August initiated this Title VII action against defendant Delta Air Lines, Inc. alleging, *inter alia*, that she was discharged from her position as flight attendant solely because she was black. August sought reinstatement, back pay, benefits,

other equitable relief and attorneys' fees and costs pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* After a bench trial the district court entered judgment in favor of the defendant. The plaintiff has appealed on the ground that the decision was unsupported by the evidence and that the district court improperly applied the law.[1] We affirm and add only a few observations to supplement the trial court's memorandum of decision and order entered on June 9, 1978.

Plaintiff offered some proof which suggested that she may have been subject to discrimination, but the evidence was superficial, incomplete, inadequate or otherwise defective. The evidence failed to establish that she was treated differently than similarly situated whites. The evidence from which it appeared that blacks on occasion may have received some preferential treatment was inconclusive in the absence of the complete files pertaining to the allegedly preferred employees and others similarly situated. The plaintiff, who had the burden of proving discrimination, selected only isolated instances for comparison of treatment. Complete personnel records of other flight attendants were not produced to help establish a basis for meaningful comparison of those employees similarly situated. *See Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1257 (5th Cir. 1977). The statistical evidence was incomplete and based only upon limited samples which may or may not have truly reflected what they purported to show.[2] *See generally Mayor of Philadelphia v. Educational Equality League*, 415 F.2d 603, 620 (1971).

Regardless of the deficiencies of the plaintiff's evidence, the defendant strongly defended the action with a non-discriminatory

1. In conjunction with this order, an opinion has been published this day, affirming the trial court's disposition of the Rule 68 offer of judgment issue in plaintiff's favor.

2. The Equal Employment Opportunity Commission interpretive manual, § 1325.6(c), makes the elementary point that comparative evidence must be complete and relate to a sufficiently large sample, or similarly situated Negroes and Caucasians so as to provide a meaningful basis for drawing a comparison.

explanation." As a result of the charge of her fourth no show on December 16, 1974, the plaintiff was placed on indefinite suspension in accordance with the rules of Delta Air Lines. On January 2, 1975, the regional manager for Delta reviewed the plaintiff's file and informed her that she was on "last chance status" saying:

> Contents within your file revealed innumerable discrepancies ranging from no shows, poor conduct while pass riding, lateness, co-worker write-ups and passenger complaints.
>
> Actions such as you've demonstrated will no longer be tolerated. You have been adequately warned and previously disciplined because of your continuing unsatisfactory job performance. By copy of this letter you are notified that this is your final warning and any future infraction will result in the termination of your employment with Delta Air Lines.

3. The following is a brief summary of the plaintiff's infractions while working with Delta Air Lines:

7 8 72	No show	4 30 78	Co-worker complaint
7 19 72	Co-worker complaint	5 5 74	Passenger complaint
7 21 72	No show	5 15 74	Discrepancy report
8 22 72	No show	6 7 74	Co-worker complaint
9 1 72	Co-worker complaint	6 21 74	Discrepancy report
9 16 72	No show	10 3 74	Discrepancy report
10 1 72	Discrepancy report	10 28 74	No show
10 8 72	Discrepancy report	11 19 74	Co-worker complaint
10 16 72	Two passenger complaints	11 24 74	Discrepancy report
		11 30 74	Co-worker complaint
12 72	Co-worker complaint	12 5 74	Discrepancy report
2 2 73	No show	12 16 74	No show
4 11 73	Discrepancy report	1 11 75	Passenger complaint
6 21 73	Discrepancy report	8 1 75	Co-worker complaint
7 17 73	Discrepancy report	8 11 75	Co-worker complaint
2 5 74	Discrepancy report	8 26 75	Discrepancy report
2 28 74	No show		

After the November 30, 1974, co-worker complaint about the plaintiff's lateness in boarding the plane, the plaintiff, for her third tardiness in 60 days, was suspended for two days. Following the imposition of the suspension, the plaintiff wrote separate letters to her Delta supervisor and base manager apologizing for her lack of responsibility. The plaintiff also told her supervisor, "Getting suspended is exactly what I deserved[.] no one brought this upon myself but me. I'm only grateful I was suspended for 2 days and not three."

After that notification, another passenger complained about the plaintiff's service, two co-workers complained about her unprofessional conduct, and other discrepancy report for tardiness was lodged against her. On August 27, 1975, the plaintiff was asked to resign, and on September 5, 1975, was fired. The record suggests considerable company forbearance without regard to the employee's race. Nonetheless, we do not view this case as frivolous.

We find no violation of the Title VII requirements. *Board of Trustees of Keene State College* v. *Sweeney*, ... U. S. ..... (1978); *Furnco Construction Co.* v. *Waters*, 438 U. S. 567 (1978); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973).

AFFIRMED.

APPENDIX E.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff*,
vs.
DELTA AIR LINES, INC., *Defendant*. } No. 77 C 95

MEMORANDUM OF DECISION AND ORDER.

JULIUS J. HOFFMAN, Senior United States District Judge. This is an action by the plaintiff Rosemary August to recover against her former employer, defendant Delta Air Lines, Inc. The plaintiff's complaint, as originally filed, was in two counts. In Count I, she seeks redress for employment discrimination allegedly practiced by Delta Air Lines. It is her position that in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, *et seq.*, Delta subjected her to ". . . terms and conditions of employment different from those of her similarly situated Caucasian co-workers . . ." and ultimately discharged her because she is a Negro. As relief, the plaintiff prays for reinstatement, back pay and such other equitable relief as may be proper. She also seeks an award of attorneys' fees and costs. These forms of recovery are expressly provided for in the Act. See 42 U. S. C. § 2000e-5.

Count II of the complaint was brought pursuant to the court's pendent jurisdiction. In that count, the plaintiff alleged that subsequent to her discharge by defendant, she sought employment with several companies, but ". . . has not been hired de-

spite her good qualifications. . . ." Pleading further, the plaintiff states that she ". . . therefore believes that . . . defendant has maliciously caused to be published to prospective employers libelous, slanderous, and defamatory statements concerning the plaintiff and having the effect of preventing her employment." For this alleged defamation, the plaintiff sought actual and punitive damages totalling $150,000.

In its answer, Delta denied all substantive allegations in the plaintiff's complaint. Delta also filed a motion for summary judgment as to Count II, arguing that there was no evidence to support the plaintiff's "belief" that she was being defamed. In support, deposition testimony from the plaintiff and the affidavit of one E. Kendall Allen, a Delta employee, were presented. The plaintiff admitted in her deposition that she was unable to cite any facts to support her "belief" she was being defamed. The affiant stated that no prospective employer inquiries regarding Rosemary August had even been received by Delta. The plaintiff elected not to oppose the motion for summary judgment, and it was granted by the court. This case therefore proceeded to trial only on the plaintiff's allegations of race discrimination in violation of Title VII.

In order for this court to have subject matter jurisdiction in this case, certain procedural prerequisites must have been satisfied. These requirements are detailed in § 706 of the Act, 42 U. S. C. § 2000e-5. First, under sub-part (c):

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed (with the Equal Employment Opportunities Commission) before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. . . . 42 U.S.C. § 2000e-5(c).

More importantly, under sub-part (e) of § 706:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved his initially instituted proceedings with a State or local agency . . . such charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . . 42 U.S.C. § 2000e-5(e).

The purpose of the State agency filing requirement is to give available State agencies a prior opportunity to consider discrimination complaints. Compliance with this requirement is critical. *Love* v. *Pullman Co.*, 404 U. S. 522, at 524 and 526 (1972). In fact, because these requirements are jurisdictional, the plaintiff has the burden of establishing them by a preponderance of the evidence. A failure to do so will leave the court without subject matter jurisdiction. *Cutliff* v. *Greyhound Lines, Inc.*, 558 F. 2d 803, at 806 (5th Cir. 1977); *Berg* v. *LaCrosse Cooler Co.*, 548 F. 2d 211, at 212 (7th Cir. 1977); *Abshire* v. *Chicago and Eastern Illinois Railroad Co.*, 352 F. Supp. 601 (N. D. Ill. 1972).

At the trial of this cause, Rosemary August presented evidence of compliance with the procedural requirements of § 706. In its post-trial brief, the defendant argued that the plaintiff had not sustained her burden of proof on this issue, and that this court therefore was without subject matter jurisdiction herein. In response to that argument, the plaintiff filed a motion by which she petitioned the court to ". . . reopen the proofs . . . for the limited purpose of further establishing that all jurisdictional requirements . . . have been met by plaintiff." That motion was granted, and a special supplementary proceeding was held for the limited purpose of accepting additional evidence on the jurisdictional issue.

From all the evidence presented, the court finds that because the plaintiff has sustained her burden of establishing compliance with the procedural requirements of § 706 by a preponderance of the evidence, this court does have the requisite subject matter jurisdiction to decide the merits of this litigation. Rosemary August was employed as a flight attendant for Delta Air Lines, Inc. commencing November 22, 1971. Her employment was terminated on or about August 27, 1975. On April 7, 1975, and again on August 28, 1975, she filed charges of unfair employment practices against Delta with the Chicago District Office of the Equal Employment Opportunities Commission. On April 11, 1975, and again on August 29, 1975, the Commission deferred her charges to the Illinois Fair Employment Practices Commission, which is the State agency with authority to address her complaint. From the evidence adduced, the only reasonable conclusion to be reached is that the Fair Employment Practices Commission elected to take no action on Miss August's complaint. Therefore, acting pursuant to its statutory authority, the Equal Employment Opportunities Commission assumed jurisdiction over this matter. On January 4, 1977, it issued its Notice of Right to Sue. The plaintiff then filed her complaint with this court on January 11, 1977.

From these facts it is clear that the time requirements of § 706 have been satisfied. More importantly, this procedure by which the plaintiff filed her charges with the Equal Employment Opportunities Commission, which Commission then deferred those charges to the Illinois Fair Employment Practices Commission for its prior consideration, does comply with the State agency filing requirement of § 706. *Love* v. *Pullman Co.*, 404 U. S. 522 (1972). Therefore, all procedural requirements of Title VII have been satisfied. This court does have jurisdiction to decide the merits of this action.

In Count I of her complaint, Miss August has alleged that she was subjected to employment discrimination on the basis of her Negro race. A number of cases have addressed the proof

requirements in private, non-class actions challenging employment discrimination. In the leading case of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), the Supreme Court was confronted with a situation where the complainant in a Title VII case alleged that his discharge and the general hiring practices of his former employer were racially motivated. In that case, the Court held that the initial burden of establishing a prima facie case of racial discrimination may be satisfied by a showing (i) that the plaintiff belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of equal qualifications. Assuming this burden of proof is discharged, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the individual's rejection. If that is done, the plaintiff then has the additional burden of proving the stated reason was just a pretext for a racially discriminatory decision. *Accord, Flowers* v. *Crouch-Walker Corp.*, 552 F. 2d 1277, at 1281 (7th Cir. 1977); *Kinsey* v. *First Regional Securities, Inc.*, 557 F. 2d 830, at 836 (D. C. Cir. 1977); *Sime* v. *Trustees of California State University and Colleges*, 526 F. 2d 1112, at 1114 (9th Cir. 1975).

While the Court in *McDonnell Douglas Corp.* v. *Green* presented this as one acceptable articulation of the specific elements necessary to establish a prima facie case, it specifically pointed out that the facts will vary in Title VII cases, so that its statement of the prima facie proof required should not be considered ". . . necessarily applicable in every respect to differing factual situations." *Id.*, at page 802, n. 13. The Court again addressed this point in *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977), where it gave a more complete statement of the proposition:

> The importance of McDonnell Douglas lies not in its specification of the discrete elements of proof there required,

but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on discriminatory criterion illegal under the Act. 431 U.S. at 358.

See also, McDonald v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, at 279, n. 6 (1976).

While this court does find the approach articulated in *McDonnell Douglas Corp.* v. *Green* to be instructive, it must conclude that the evidence presented here does not lend itself to the application thereof. But regardless of the approach adopted, what a plaintiff must establish as a minimum in a Title VII case is that he/she is a member of a protected class and that he/she was subjected to disparate treatment which was "racially premised."[1] *International Brotherhood of Teamsters* v. *United States*, 431 U. S. at 335; *see also, Barnes* v. *St. Catherine's Hospital*, 563 F. 2d 324 (7th Cir. 1977). These facts must be established by a preponderance of the net of all the evidence. *Barnes* v. *St. Catherine's Hospital, supra; Henry* v. *Ford Motor Company*, 553 F. 2d 46 (8th Cir. 1977). In other words, in order to prevail, as a minimum, Rosemary August must establish by a preponderance of all the evidence that because she is a Negro, she was subjected to employment standards that were different from those imposed on similarly situated Caucasian flight attendants so that she was terminated while similarly situated Caucasian flight attendants were not. Viewing the evidence presented in this case against these requirements, the court has no difficulty in reaching its decision.

Rosemary August is 27 years old; she is a member of the Negro race. She applied for a position as a flight attendant with Delta Air Lines by sending her employment application to their corporate offices in Atlanta, Georgia in October of

1. This is not to say that a showing of a discriminatory *purpose* is required in Title VII cases. It is clear that there is no such requirement. *Washington* v. *Davis*, 426 U. S. 248 (1976); *United States* v. *City of Chicago*, No. 77-1171 (7th Cir. February 21, 1978).

1971. Following an interview on November 3, 1971, the plaintiff was employed as a flight attendant and, after an initial training period, she was assigned to Delta's base at O'Hare International Airport in Chicago, Illinois. She worked as a flight attendant for Delta until her termination on August 27, 1975.

Delta Air Lines, Inc. is a national airline with its headquarters in Atlanta. It operates various bases throughout the country. The O'Hare base has a Base Manager who is in charge of all Delta flight attendants assigned to that base. Reporting directly to the Base Manager are supervisors. Each supervisor is charged with primary responsibility for a certain number of flight attendants.

From 1971 through October of 1973, the Base Manager at O'Hare Airport was June Kulencamp. Commencing in October of 1973, Nancy Severtsen filled that position. Throughout the period of Miss August's employment her immediate supervisor was Carolyn Powers.

These positions are important both because they are positions of authority and because responsibility for flight attendants' employment files is vested in the Base Manager and supervisors. The importance of this later factor lies in the fact that Delta employment decisions such as advancement, discipline and termination are, to a large extent, made based on what is contained in the flight attendant's file.

A termination decision at Delta normally requires first a determination by the supervisor and Base Manager that a flight attendant has failed to satisfy Delta standards for continued employment. Next, the employee file and a recommendation for termination are sent to the defendant's corporate headquarters in Atlanta where they are reviewed by various management personnel. These people include a member of the defendant's staff of in-house counsel, defendant's Equal Employment Manager, and the corporate Vice-President in charge of personnel. On their concurrence, a Delta flight attendant is terminated.

In the case of Rosemary August these steps were carried out. After Nancy Severtsen and Carolyn Powers decided to recommend her termination, Miss August's records were transmitted to Atlanta. There, they were reviewed by Peter Caldwell, Administrative Assistent-Personnel, Hunter Hughes, one of the defendant's in-house counsel, Richard Ealey, Equal Employment Manager, and R. W. Allen, Vice-President-Personnel Benefits. Each of these individuals agreed with the original recommendation, and Rosemary August was terminated.

The decision to terminate was based on a determination of "poor job performance and attitude". The supervisory personnel involved based this conclusion on their findings that Rosemary August had committed a number of "no-shows" (failures to report for an assignment on time or other equally serious misconduct), that numerous co-worker and passenger complaints had been filed against her, that she was not properly performing her job and that she had been guilty of various Delta policy infractions.

The plaintiff has taken the position that Delta Air Lines' base at O'Hare International Airport had, between 1971 and 1975, a policy or practice of subjecting Negro flight attendants to discriminatory treatment, and that she was the victim of this discrimination. She argues that in the case of Negro employees in general and herself in particular, in making entries into flight attendant's files and in reaching employment decisions, the defendant held Negro attendants to higher or stricter standards than Caucasians. As the court has previously noted, entries in flight attendants' employment files are critical to the defend ant's employment decisions. Therefore, a showing that the defendant was guilty of disparate treatment regarding file compilations would be highly probative of a Title VII violation.

In support of her allegations of disparate treatment, the plaintiff chose not to present for comparison the full employment files of Rosemary August and similarly situated Caucasian flight attendants. As will be more fully developed, she also elected to

make only limited use of statistical data. Instead, her approach was primarily to present evidence to demonstrate that on particular occasions Caucasian flight attendants were treated a certain way while in similar situations either Rosemary August or one of Delta's other Negro flight attendants was dealt with more harshly.

The record presented in this case does establish that Rosemary August did perform her job on various flights in what one individual described as a "top notch" manner. During her career with Delta, she received a number of complimentary letters from passengers, which letters were placed in her file. She was also formally complimented by co-workers on occasion; those compliments were also made a part of her file. More importantly, she also received one Customer Service Award and two Feather-In-Your-Cap Awards. These are awards issued by Delta's corporate office for outstanding service by an employee. They are awarded to a flight attendant who has conducted himself or herself on a flight, or has in some other manner performed his or her duties in an exemplary manner. The Customer Service Award includes Delta Air Lines, Inc. stock certificates, recognition in the Delta Digest, a company newsletter, and a letter of appreciation from the Chairman of Delta's Board of Directors.

However, the record also contains evidence that establishes Mis August was capable of poor or unacceptable performance Her file contains four "no show" citations; it is Delta's established policy that an employee may be subject to dismissal for four such infractions. Her file also contains a number of co-worker and supervisor complaints. Co-workers found that the plaintiff could be offensive in her manner and uncooperative. Additionally a number of letters of criticism were received from passengers. The plaintiff defendant against these complaints by claiming they were not factually correct. She also argued they were not adequately investigated by Delta. The court cannot respect failures to investigate complaints. Nevertheless, the com-

plaints were filed, and they were received from a number of sources.

From all of this evidence, the court concludes that Rosemary August was capable of quality work performance, but was also guilty of carrying out her duties in a manner that was unacceptable to her employer. However, this is not the issue now before the court. What this court must now decide is whether the plaintiff has established by a preponderance of the evidence that two standards of performance were applied at Delta's O'Hare Airport base, and that Rosemary August, as a Negro, was a victim of this double standard. After a thorough review of the record in this case, the court must conclude that this burden has not been met.

The most probing evidence of disparate treatment presented in this case was a showing that in the period from 1972 through 1975, of a total of 34 flight attendants terminated, 10 (or 29%) were Negroes. And when the period is extended through 1976, 13 out of 38 (or 34%) were Negroes. Delta maintains a total staff of approximately 500 flight attendants at its O'Hare base. From the available evidence, approximately one-fifth of that total, or approximately 100 of Delta's flight attendants, are Negroes.

The defendant has argued that where the statistical sample is small as is admittedly the case here, the results obtained should be rejected as meaningless. In support, it cites, *inter alia*, *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605 (1974); *Robinson* v. *City of Dallas*, 514 F. 2d 1271 (5th Cir. 1975); *Morita* v. *Southern California Permenente Medical Group*, 541 F. 2d 217 (9th Cir. 1976); *Ochoa* v. *Monsanto*, 473 F. 2d 318 (5th Cir. 1973). With this argument, the court does not agree.

In the recent Supreme Court case of *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977), the Court did caution that "(c)onsiderations such as a small sample size may, of course, detract from the value of such

evidence, [citing *Mayor of Philadelphia* v. *Education Equality League*, 415 U. S. 605, at 620-621 (1974)]. . . ." However, in that case the Court also noted that wtih proper caution, they can be of assistance to the fact finder in reaching his decision. See *International Brotherhood of Teamsters* v. *United States*, 431 U. S. at 339-340. Other cases are in accord; *see e.g.*, *Burns* v. *Thiokol Chemical Corporation*, 483 F. 2d 300, at 305-307 (5th Cir. 1973); *Equal Employment Opportunity Commission* v. *Eagle Iron Works*, 424 F. Supp. 240 (S. D. Ia. 1976).[2]

While these statististics do constitute evidence of disparate treatment because of the small numbers of employees involved relative to Delta's employment population, they cannot constitute conclusive proof thereof. See *International Brotherhood of Teamsters* v. *United States*, *supra*, and other cases previously cited herein. Rather, they must be considered along with all of the evidence in deciding this case.

As the court has previously stated, the main thrust of the plaintiff's case was a showing that in numerous specific situations Delta's supervisory personnel dealt more harshly with Negroes, both as to the disciplinary action taken and as to the entries made to the employees' files, than Caucasians. A review of every such incident is not practicable, and the court will not now attempt to do so.

However, one incident involving the plaintiff is sufficiently offensive to this court that individual recognition must be given to it. Based on little more than rumors or gossip, in April of 1972 defendant's then Base Manager, June Kulenkamp, determined to have Rosemary August examined for a venereal disease. Not only was the plaintiff not given any chance to con-

2. In reaching this decision to give weight to this statistical evidence presented by the plaintiff, the court has determined that it must reject plaintiff's argument that the proper measuring period is only 1975, the year she was terminated. In that year, 6 of 8 terminations involved Negroes. Clearly, 1975 cannot stand alone because the sample is too small, the measuring period is too short to be meaningful, and the results obtained are misleading.

front the sources of Kulenkamp's information, she was not even told why she must submit to the medical examination until after the tests proved negative. In the interim, she was left to speculate on the need for this immediate physical examination. While the court believes the embarrassment and anxiety caused Rosemary August in this incident were unnecessary and the result of improper handling of the situation, it cannot find a racial motive therefor in the record. There simply was no showing that any other flight attendant, Negro or Caucasian, was subjected to treatment even remotely similar thereto.

By the remainder of her evidence, the plaintiff presented numerous other incidents where one employee, a Negro, was dealt with severely while in similar situations lesser measures were taken against Caucasian flight attendants. These included showings that Negroes were given "no shows", suspensions, and "discrepency reports" (on the order of a warning notice) where in like cases, Caucasians were dealt with more tolerantly. However, both by its own evidence and during cross-examination, the defendant established that on an equal number of occasions, Delta personnel showed favoritism to Negroes.

For example, the plaintiff established that for infractions such as tardiness, missing Delta training sessions, not being within ready telephonic reach while on reserve duty, substandard work performance, substandard service to passengers, offensive disposition, missing scheduled uniform and weight checks, and for various other infractions, stern measures were taken against Negroes in general and Rosemary August in particular, while a more tolerant attitude was displayed toward Caucasians. Additionally, the plaintiff demonstrated that in certain cases, the benefit of any doubt was shown a Caucasian flight attendant but not a Negro. Finally, certain Caucasian flight attendants who were in jeopardy of losing their jobs were given more warnings and "last chances" than certain Negro attendants.

Standing unrebutted, this evidence would raise the necessary inference of racial bias. However, the evidence establishes that

in equal numbers of cases, it was the Negro that benefited from a benevolent supervisor. Negroes were given discrepancy reports (warnings) instead of "no shows", or were excused from any discipline where in similar situations Caucasians were dealt with severely.

Rosemary August's own employment history includes such incidents. While her file contains four "no shows", it was established that she was properly subject to citation on at least three additional occasions. At other times, she received only verbal reprimands or was excused from any discipline when her conduct could under Delta policy have resulted in the imposition of stronger sanctions.

In reaching its conclusion in this case, the court must note certain discrepencies in the testimony. It is established Delta policy that an applicant disclose any prior employment within the airline industry. Rosemary August had previously been employed by United Airlines, Inc. when she applied for the position of flight attendant with Delta Air Lines. Her employment application fails to disclose this fact. While Miss August testified that she orally disclosed this experience during her job interview but was told "not to worry about it", the interviewer involved, Kendall Allen, denied this. Allen also testified, and it appears reasonable to conclude, that prior airline experience is an important element in evaluating a job applicant. Miss August also testified that in her opinion she had performed her duties as a flight attendant in an acceptable manner and was not adequately apprised of dissatisfaction harbored by her supervisors. However, it was shown that in December of 1974, following a series of events culminating in a two-day suspension, Rosemary August sent letters of apology to both Base Manager Severtsen and her immediate supervisor, Carolyn Powers, in which she acknowledged that she may have been guilty of substandard work performance and would endeavor to correct the situation. As is its duty, the court has taken these factors into account in

determining the weight to be given to the evidence presented by the parties in this lawsuit.

From the evidence presented, it would appear that Delta Air Lines, Inc. may not be the most pleasant place to work. However, this trial record does not establish that its employment practices are racially premised. It further does not support the conclusion Rosemary August was subjected to disparate treatment, either in her employment or termination, because of the fact she is a Negro. For this reason, this court has concluded that it must enter its judgment in this case in favor of the defendant.

Accordingly, this case will be, and the same hereby now is dismissed with prejudice in favor of the defendant Delta Air Lines, Inc. and against the plaintiff Rosemary August. Each party will bear its own costs of litigation. No award of attorney's fees will be made in favor of either party.

This Memorandum of Decision and Order is intended to satisfy the provisions of Rule 52(a) of the Federal Rules of Civil Procedure which require the court to set forth its findings of fact and conclusions of law in all cases tried by the court sitting without a jury.

Dated at Chicago, Illinois, this 9th day of June, 1978.

APPENDIX F.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROSEMARY AUGUST, *Plaintiff,*
vs.
DELTA AIR LINES, INC., *Defendant.*
No. 77 C 95

PROOF OF SERVICE OF OFFER OF JUDGMENT

State of Illinois } ss.:
County of Cook }

Max C. Brittain, Jr., being duly sworn, deposes and says:

1. I am attorney for the defendant in this action.

2. On May 12, 1977, Delta Air Lines, Inc., the defendant in this action, served upon plaintiff's attorney the annexed offer of judgment.

Max G. Brittain, Jr.,
One of the Attorneys for
Defendant Delta Air Lines, Inc.

Dated:

Notary Public

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROSEMARY AUGUST,
Plaintiff,
vs.
DELTA AIR LINES, INC.,
Defendant.

No. 77 C 95

OFFER OF JUDGMENT

To: Carole K. Bellows
Bellows & Bellows
One IBM Plaza, Suite 1414
Chicago, Illinois 60611

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450 which shall include attorney's fees, together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damage.

Max G. Brittain, Jr.,
One of the Attorneys for
Defendant Delta Air Lines, Inc.

Of Counsel:
Schiff Hardin & Waite
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
876-1000

Sidney F. Davis
Hunter R. Hughes
Delta Air Lines, Inc.
Hartsfield Atlanta International Airport
Atlanta, Georgia 30320

APPENDIX G.

Original Rule 68, eff. September 16, 1938

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time.

As amended, eff. March 19, 1948

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

The fact that an offer is made but not accepted does not preclude a subsequent offer.

As amended, eff. July 1, 1966

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

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OCTOBER TERM, 1979

No. 79-814

DELTA AIR LINES, INC.,

Petitioner,

vs

ROSEMARY AUGUST,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The respondent, Rosemary August, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals, affirming the unreported decision of the District Court, and the

unreported decision itself are reproduced in the appendix to the petition.*

STATEMENT OF THE CASE

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* by the respondent, Rosemary August, against the petitioner, Delta Airlines, Inc., on January 4, 1977, after the receipt by Respondent of a right to sue letter from the Equal Employment Opportunity Commission. The respondent, alleging, *inter alia*, that she was discharged from her position as a flight attendant because she was black, sought back pay, benefits, reinstatement, other injunctive relief, and attorneys' fees and costs in accordance with the provisions of 42 U.S.C. §2000e-5.

More than four months after Respondent filed suit, Petitioner tendered an offer of judgment to Respondent pursuant to Rule 68 of the Federal Rules of Civil Procedure ("Federal Rules"). (App. G, A 36). By its offer, the petitioner proposed "to allow judgment to be taken against it . . . in the amount of $450.00 [including] attorney's fees, together with costs accrued to date." (App. F, A 33-34). Respondent did not accept the offer.

A five-week bench trial ensued, at the close of which the district court entered judgment for the Petitioner. (App. E, A 19-32). The trial judge found that although the record did reveal some evidence of disparate treatment (App. E, A 29), the preponderance of the evidence did not indicate the difference of treatment was the result of racial discrimination. (App. E, A 28). Each party was ordered to bear its own costs. (App. E, A 32).

* Reference to those opinions as well as to Rule 68 of the Federal Rules of Civil Procedure will be made to the petition as "App. ----, A ----."

Following entry of judgment for the Petitioner by the trial court, the Petitioner filed a motion for costs. The district court denied the motion, holding that the petitioner's offer of $450.00 was not "arguably reasonable" in view of the size and merit of Respondent's claim. (App. C, A 11-12).

Respondent appealed on the merits and the petitioner cross-appealed on the basis of the denial of costs. The Court of Appeals affirmed the judgment for the petitioner on the merits, noting that Petitioner had "offered some proof which suggested that she may have been subject to discrimination" (App. D, A 16), and that it ". . . [did] not view [the] case as frivolous." (App. D, A 18).

The Seventh Circuit affirmed the denial of Petitioner's Rule 68 motion. (App. B, A 2-7).

In the order issued August 28, 1979, the Court of Appeals denied Petitioner's Petition for Rehearing and Suggestion for Rehearing en Banc. (App. A, A 1).

REASONS FOR DENYING THE WRIT

This suit was initiated pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* The Court of Appeals, affirming *per curiam* the District Court decision, properly rejected an interpretation of Rule 68 so technical as not to encompass the basic underlying elements of reasonableness and good faith. (App. B, A. 7)

The notion that a federal rule is based on such a foundation is neither new nor unusual; rather, it is in keeping with the mandate of Rule 1 of the Federal Rules to construe the Rules "to secure the just . . . determination of every action." Toward this end, and in recognition of the national policy underlying Title VII, the Court of Appeals approved the exercise of discretion under Rule 68 in a Title VII case. The Seventh Circuit held that costs might be allowed in such a case when a trial judge could determine that a Rule 68 offer "... had been made in good faith and ... had some reasonable relationship in amount to the issues, litigation, risks and expenses anticipated and involved in the case." (App. B, A. 7)

The issues the Petition seeks to raise involve no conflict among the circuits.

The Petition cites two district court cases, *Dual v. Volpe*, 59 F.R.D. 696 (D.D.C. 1973), and *Mr. Hanger, Inc. v. Cut Rite Plastic Hangers, Inc.*, 63 F.R.D. 607 (S.D.N.Y. 1974), in support of the proposition that once the technical requirements of Rule 68 have been met, the cost-shifting provisions of the rule should operate automatically. (Pet. at 12-13). It is the respondent's position that both of these decisions are in harmony with the decision of the Court of Appeals in this case.

In *Dual*, a Title VII case, the trial court found for the defendant. Although that court held that the defendant was automatically entitled to costs under Rule 68, the elements of good faith and reasonableness were apparently never questioned.

In *Mr. Hanger*, a patent infringement suit, the court specifically addressed the elements of good faith and reasonableness. In awarding costs to the defendant, it found that the defendant's Rule 68 offer constituted essentially the same relief requested in the complaint by the plaintiff.

The Petition attempts to magnify the need for this Court's review by presenting an elaborate recounting of the history of costs awards. (Pet. at 12-18). Petitioner acknowledges, however, that litigation involving the particular issues raised herein has been rare. (Pet. at 12). In the more than forty-one years since the enactment of Rule 68 (App. B, A. 15), only six federal cases have interpreted its provisions. (Pet. at 13, n. 6). By Petitioner's admission, *Dual*, *supra*, and *Mr. Hanger*, *supra*, are the only federal decisions in which the issue of "mandatory versus discretionary application" of the Rule has been directly addressed. (Pet. at 12). Viewing Rule 68 in this context, it must be concluded that the Rule is unlikely to generate repeated litigation in the federal courts.

In light of the current state of federal case law with respect to Rule 68, and because, as will be shown below, the Court of Appeals correctly decided the issues before it, this Court should deny the petition for certiorari.

A. "REASONABLENESS" AND "GOOD FAITH" ARE IMPLICIT REQUIREMENTS OF RULE 68.

It is the undisputed and sole purpose of Rule 68 to encourage settlement in order to expedite litigation. *Staffend v. Lake Central Airlines, Inc.*, 47 F.R.D. 218 (N.D. Ohio

1969).* By placing the risk of cost liability on an offeree, Rule 68 discourages the offeree from rejecting an offer unless the possibility is strong that the judgment obtained will exceed the offer.

A defending party, however, bears no similar risk under Rule 68. Consequently, as the Court of Appeals noted in this case, given the automatic application of Rule 68 which the petition urges, an offeree might routinely tender token offers in bad faith as a means of procuring "cheap insurance against costs." (App. B, A 5). Clearly, this practice would afford neither party any incentive to settle, the result being the protraction of litigation which Rule 68 seeks to avoid.

Because the intended purpose of Rule 68 will be served only by an offer made in genuine contemplation of settlement, the concepts of reasonableness and good faith are implicit in its terms and fundamental to its application. Assuming a finding that a claim is not wholly lacking in merit, Rule 68 is not to be applied automatically. Before an offer is permitted to trigger the cost-shifting provisions of Rule 68, the trial court must determine that the offer has been made in a good faith attempt to meet a plaintiff's reasonable expectations. Although Petitioner charges the Seventh Circuit with the "emasculation" of Rule 68 (Pet. at 6-7), in reality it would be a rigid and overly technical construction and not the Court of Appeals' prudent application of the Rule which would render it powerless to accomplish its purpose.

Petitioner's allegation that the Court of Appeals' application of Rule 68 "effectively duplicates" Rule 54(d) (Pet. at 15-18), is equally unfounded. Inquiry into the reasonableness and good faith of an offer ultimately affects

* See also *Fed. R. Civ. P.* 68, Advisory Committee Note on 1946 Amendment, 28 U.S.C.A. (West 1970) and 7 Moore's Federal Practice ¶68.02 (2d ed. 1972).

only those who would take unfair advantage of the Rule. Rule 68 continues to operate as incentive and encouragement to resolve litigation when there is a *bona fide* attempt to settle a lawsuit.

B. THE COURT OF APPEALS' INTERPRETATION OF RULE 68 IS CONSISTENT WITH THE OBJECTIVES OF TITLE VII.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* was enacted by Congress to encourage individuals to seek redress for violations of their civil rights. In furtherance of this goal Title VII specifically authorizes the award of attorneys fees and costs.

Recognizing "the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII," this Court has provided special protection for Title VII plaintiffs by limiting the award of attorneys' fees to the prevailing defendant to cases where the claim is found to be unreasonable, frivolous, vexatious or meritless. *Christianburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412, 422 (1978). The Court of Appeals in the present case, citing *Christianburg*, similarly recognized the intent of Congress to facilitate the vindication of an aggrieved party's civil rights. Accordingly, it properly refused "to permit a technical interpretation of [Rule 68] to chill the pursuit of that high objective." (App. B, A 6).

CONCLUSION

The Congressional intent embodied in both Title VII and Rule 68 itself dictates the result reached twice in this case. Through the exercise of sound judicial discretion the Court of Appeals and the District Court avoided a result clearly never envisioned by Congress in enacting Title VII or the drafters of Rule 68. These courts have committed no error. Petitioner has presented nothing to this Court which conforms to the guidelines of Rule 19 or otherwise merits review. For these reasons, the petition should be denied.

Respectfully submitted,

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OCTOBER TERM, 1979

No. 79-814

DELTA AIR LINES,
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v.

ROSEMARY AUGUST,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC"), with the consent of all parties, respectfully submits this brief as Amicus Curiae.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, pro-

edures, and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique competence and understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and the various other federal orders and regulations pertaining to nondiscriminatory employment practices. As such, they have a direct interest in the issue presented for the Court's consideration in this case, namely, whether the mandatory procedure of Rule 68[1]

[1] Fed. R. Civ. P. 68 reads as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

is inapplicable, however, and merely because Title VII litigation is involved.

As a significant part of its activities, EEAC has participated as amicus curiae in a number of cases before this Court which involved procedural issues under Title VII. *See, e.g., General Telephone Company of the Northwest, Inc., et al. v. EEOC*, 48 U.S.L.W. 4512 (U.S. May 12, 1980); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Mohasco Corp. v. Silver*, 48 U.S.L.W. 4851 (U.S. June 23, 1980); *Delaware State College v. Ricks*, 605 F.2d 710 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980).

SUMMARY OF ARGUMENT

The Seventh Circuit's ruling, which denied the prevailing defendant Company its costs despite the proper tender of an offer of judgment pursuant to Rule 68 of the Fed. R. Civ. P., incorporates a serious misreading of the federal district court rule and, unless overturned, threatens to discourage settlement, promote litigation and generate inconsistency in the federal procedural framework. Moreover, the court's decision is particularly incongruous because it de-

parts from the plain wording of the federal rule purportedly to accommodate the overriding interests reflected in Title VII when, in fact, those interests would best be served if the rule were read and applied as written.

The language of Rule 68 is not obscure or ambiguous. It permits a defendant to make an offer of judgment to settle a claim, and if the offer is not accepted within ten days and the plaintiff fails to obtain a more favorable judgment at trial, the rule specifies that the plaintiff "must" pay costs of trial from the time of the offer. The manifest purpose underlying the rule is to encourage settlement by providing a carefully balanced system of rewards and punishments. Rule 68 is classified under Part VIII of the Fed. R. Civ. P., entitled "Provisional and Final Remedies and Special Proceedings," and is directed as much toward promoting the public benefits that flow from a speedy resolution of lawsuits as toward satisfying the expectation of private parties. It should not be confused with Rule 54(d), under Part VII of the Fed. R. Civ. P. ("Judgment"), which permits the trial court in its discretion presumptively to award costs to the prevailing party. Rule 54(d) is not a tool for expediting litigation; rather, it is concerned with consequences which typically will hinge upon the merits of a case, and because of its discretionary language, contains within it the implication that elements of good faith may enter into the decision.

Until the decision of the Seventh Circuit below, lower federal courts had applied the clear language of Rule 68 consistently to award costs to prevailing defendants who had made Rule 68 offers. *Mr.*

Hanger, Inc. v. *Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974), and *cases therein cited.* Moreover, the courts had been careful to distinguish between the operation of Rules 54(d) and 68, while at the same time acknowledging the appropriateness of both rules to Title VII litigation. *Dual* v. *Cleland*, 79 F.R.D. 696 (D.D.C. 1978). The opinion of the court of appeals expresses no justification which would warrant its unprecedented departure from the language and operation of Rule 68 for Title VII litigants. Its imposition of a "good faith" standard has no basis in the rule and, in light of the adverse consequences defendants could suffer from offers of judgment accepted and publicly recorded, is in any event unnecessary. The court's reference to provisions governing the award of attorney's fees to determine Rule 68 applicability merely confuses the rule with that of a different rule to the detriment of the parties and of the courts.

Rule 68 advances an important public interest: to encourage parties to settle a case as early as possible by giving the defendant an incentive to make an offer and the plaintiff an incentive to accept. This interest is no less important under Title VII, where the non-litigative tools of conference, conciliation, persuasion and settlement play a crucial role in the statutory enforcement scheme.

ARGUMENT

RULE 68 IS A MANDATORY COST-SHIFTING PROVISION, AND THE COURT OF APPEALS' DECISION TO TRANSFORM IT INTO A DISCRETIONARY PROVISION IN TITLE VII SUITS VIOLATES ITS PLAIN WORDING AND DESTROYS ITS EFFECTIVENESS AS A VALUABLE TOOL TO PROMOTE SETTLEMENT

A. Rule 68 and its Role Within the Federal Civil Procedure Scheme

Rule 68 specifies that if the defendant makes an offer of judgment which is rejected, and the plaintiff fails to obtain a more favorable judgment at trial, the plaintiff *must* pay the costs of trial from the time of the offer. The question here is whether the provisions of the rule is inapplicable whenever, and merely because, Title VII litigation is involved.

For 33 years, Rule 68 has been acknowledged as an instrument "to encourage settlement and avoid protracted litigation." Fed. R. Civ. P. 68, Advisory Committee Note on 1946 Amendments, 28 U.S.C.A. (West 1970). *Maguire v. Federal Crop Ins. Corp.*, 9 F.R.D. 240 (W.D. La. 1949). Accordingly, courts have ruled that whenever a plaintiff does not obtain a judgment exceeding an offer made by the defendant, the cost-shifting provision becomes operative and the judge loses the discretion he normally has to deny costs to the defendant. *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 610-11 (E.D.N.Y. 1974); *Deal v. Cleland*, 79 F.R.D. 696 (D.D.C. 1978). The reason for the mandatory language is patent: the defendant will seek settlement of a case by paying a sum certain to the plaintiff, without any

determination of liability by a court, only if it is given a realistic inducement.

Apparently unnoticed by the Seventh Circuit,[*] are the different roles played by Rules 68 and 54(d)[**] in the litigation process. Rule 54(d), which is included within Part VII ("Judgment") of the Fed. R. Civ. P., grants almost unreviewable discretion in the district court to award or to disallow costs to the prevailing party. See *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964). And, "[i]n determining whether costs should be allowed the court must consider the equities and public interests at stake." *County of Suffolk v. Secretary of Interior*, 76 F.R.D. 469, 472 (E.D.N.Y. 1977). Inherent in the court's calculation will be good faith considerations, particularly where public laws designed to promote significant societal interests are involved.

Rule 68, on the other hand, is designed specifically to encourage parties to *cut off* litigation. As written,

[*] "The court of appeals acknowledged the company's argument that unless Rule 68 is followed strictly according to its terms, the rule will overlap the trial judge's express discretion under Rule 54(d), 600 F.2d at 701. Despite the "force" of this argument, the court concluded without analysis, it was "not persuaded." *Id.*

[**] Fed. R. Civ. P. 54(d) reads as follows:

> Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

the rule, which is classified not under "Judgment," but under "Provisional and Final Remedies and Special Proceedings" (Part VIII of the Fed. R. Civ. P.), is designed to encourage settlement, *even though the equities of a case may favor a more substantial judgment than that agreed to by the parties.* The rule does not contemplate a good faith evaluation, for so long as there is no breach of professional ethics, parties *should* perceive the rule as advantageous to their cause and, for the benefit of the court system as well as for themselves, engage in such offers.

If, as in the view of the Seventh Circuit, Rule 68 is construed merely as a restatement of Rule 54(d), offers of judgment would cease to be made. The inevitability of this conclusion follows from an understanding of how Rule 54(d) operates, and why its operation could not be adapted to Rule 68 situations. To take one illustration, in a case brought by representatives of the public challenging governmental action allegedly threatening the environment, the district court reasoned that under Rule 54(d), costs should be denied to successful defendants where cost-related equities favor the plaintiffs. Among the questions the court declared it would weigh were the following: (1) was the action brought and carried forward in good faith; (2) did its prosecution provide direct or indirect benefits to the public; (3) did it result in direct or indirect benefit to defendants; (4) were novel and substantial issues of law or fact resolved; (5) are costs required to reimburse needy defendants; (6) will the costs unduly burden non-affluent plaintiffs; (7) and will imposition of costs unduly inhibit future challenges to environmental decisions, thus reducing the effect of substantive environmental protections? *County of Suffolk* v. *Secretary of Interior*, 76 F.R.D. 469 (E.D.N.Y. 1977). While these may be proper kinds of factors for the district court to consider after having had a trial on the merits, no party ever is likely to make an offer of judgment to settle a case if, even to settle a case before trial, it must undertake such an extensive showing. Thus, the rewriting of Rule 68 by the Seventh Circuit, if allowed to stand, would effectively nullify its provisions.

While the court of appeals made no attempt to reconcile its decision with the plain wording of the rule, it intimated that "a technical interpretation of a procedural rule" should not be permitted in Title VII cases because it would "chill" the pursuit of the goals incorporated in that statute. 600 F.2d at 701. As we will show below, even if a departure from the rule could be justified on such grounds, these concerns are without foundation; indeed, disregarding Rule 68 would be antithetical to the purposes of Title VII.

B. The Role of Rule 68 in Title VII Litigation

The importance and weight of the procedural requirements embodied in the Federal Rules are reflected in the precise and complex manner Congress deliberately chose for promulgating and amending those Rules. *See* 28 U.S.C. § 2072. A departure from the Rules, especially one completely abrogating an entire rule for an entire class of lawsuits, is not lightly to be inferred from an Act of Congress that does not explicitly amend the Federal Rules or, indeed, even mention Rule 68.

The Seventh Circuit, without analysis of the statute and its legislative history, concluded that Title VII requires that Rule 68, contrary to its language, be read to mean that the awarding of costs under the rule is discretionary, rather than mandatory. Yet, an examination of Title VII reveals that the mandatory nature of the rule promotes Title VII policy.

Initially, it should be noted that when it originally enacted Title VII in 1964, Congress expected that the majority of discrimination cases would be resolved outside of court. See Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, at 414 (1972) ("Legislative History"). In adopting the 1972 amendments to Title VII, moreover, Congress intended that "direct Federal enforcement" (118 Cong. Rec. 4941 (1972)), rather than private litigation, would serve as the primary means of achieving compliance. 118 Cong. Rec. 7168 (1972).[1] See *Occidental Life Insurance Co. of Calif.* v. *EEOC*, 432 U.S. 364, 368 (1977).

[1] Implicit in the 1972 amendments is the premise of the general applicability of the Federal Rules of Civil Procedure, and conspicuous by its absence is any evidence that Congress intended to alter the procedural requirements otherwise applicable to private civil actions under Title VII. Congress assumed the general applicability of the Federal Rules, *Legislative History* at 201, 221, 226, 278, 807, 1003, 1429, 1485. This Court has recently eschewed the suggestion that the Federal Rules generally are inapplicable to Title VII actions. See *General Telephone Co. of the Northwest, Inc., et al.* v. *EEOC*, 48 U.S.L.W. 4513, 4517, n.16 (U.S. May 13, 1980), *citing Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975).

To be sure, private suit not only is recognized and provided under Title VII, but is acknowledged to "involve the vindication of a major public interest." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778 n.40 (1976), quoting Section-By-Section analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 188 Cong. Rec. 7166, 7168 (1972). Nevertheless, the statutory emphasis upon "informal methods of conference, conciliation and persuasion," Civil Rights Act of 1964, § 706(a), underscores a statutory design that is framed with the intention of reducing resort to litigation. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). One of the most effective tools for promoting settlement and reducing litigation is Rule 68. As a mechanism intended not to shape or promote litigation, but to avoid it, the rule serves a crucial public purpose of Title VII: to promote the efficient settlement of equal employment opportunity claims.

Other practical considerations compel a straightforward application of Rule 68 to Title VII suits. In an area of the law which is exceedingly complex, and where the governing legal principles are evolving rapidly, successful Title VII defendants incur ever-expanding legal costs to assist the courts in determining the proper interpretation of the requirements of Title VII. The successful defense against Title VII allegations which are proved meritless is extremely burdensome, even to larger employers who may have to make substantial adjustments to finance such litigation, often by increasing costs to con-

sumers.[8] A Rule 68 offer of judgment, which compels plaintiffs to evaluate their claims realistically, is one of the few procedural devices available to a defendant which enables it to reduce the costs of litigation, especially in circumstances where it views the plaintiff's claims as meritless.

C. The Reasons Advanced By The Lower Courts For A Non-Literal Reading of Rule 68 Are Either Inapposite To This Case or Intrinsically Insubstantial

Assuming, *arguendo*, that circumstances could exist which warrant a court, *sua sponte*, to reformulate a federal rule for purposes of a case or class of cases, neither opinion of the courts below demonstrate that such a case is here presented. That the two courts, in casting aside the literal language of the rule, emphasized different rationales *does* demonstrate that if the anchor of plain meaning is lifted, the rules could be cast adrift in a sea of competing, and perhaps conflicting rationales. Ultimately, uniformity in Federal procedure could be irreparably damaged by *ad hoc* exercises in rulemaking.

The district court relied upon a view of Rule 68's purpose ("to encourage settlements and avoid protracted litigation") which, it declared, compelled consideration of an element not included in the rule, that of "reasonableness." Pet. App. A. 11. The court did

[8] It should be noted as well that a substantial number of Title VII cases do *not* involve large, nationwide corporations that presumably are better able to pass the costs of such litigation on to consumers. The costs of mounting a successful defense may impact severely upon small and medium sized employers; thus, a procedural device like Rule 68 which promotes settlement may be critical to them.

not indicate whether the question of reasonableness could be litigated, with the likelihood of slowing down, rather than speeding up litigation. See pp. 8-9, *supra*. Moreover, the court gave no indication that its construction of Rule 68 would apply only under Title VII, and not to all kinds of cases.

On appeal, the Seventh Circuit arrived at the same result but concerned itself less with Rule 68 and much more with Title VII. Cases interpreting Rule 68 which the district court had found "supportive," *Perkins* v. *New Orleans Athletic Club*, 429 F. Supp. 661 (E.D. La. 1976), and *Honea* v. *Crescent Ford Truck Sales, Inc.*, 394 F. Supp. 201 (E.D. La. 1975), were brushed aside by the Seventh Circuit as providing "at best only inferential" support for the plaintiff's position. *Compare* Pet. App. A. 11 *with* 600 F.2d at 702. While the court of appeals expressed "fear" that token offers by defendants seeking "cheap insurance" against costs would damage the vitality of Rule 68, 600 F.2d at 701, its "liberal" reading of the rule was based largely upon the favored position of Title VII plaintiffs as reflected in the statute's counsel fee provision. Neither of these arguments, when examined, merit the court's disregard for the plain language of the rule.

The court of appeals' reliance upon the attorney's fee provision in Title VII is simply inapposite to the case here. That provision, 42 U.S.C. § 2000e-5(k) ("Section 706(k)"), which specifically permits the trial court "in its discretion" to allow the prevailing party a reasonable attorney's fee as part of the costs, concerns the consequences of *judgment* (like Rule 54(d)), not the consequences of an *offer* of judgment. In overlooking this distinction, the court of appeals

missed the purpose of the attorney's fee provision. It is intended not to encourage settlement, but, in the case of a prevailing plaintiff, to make recovery complete "*against a violator of federal law;*" in the case of a prevailing defendant, to protect it from "burdensome litigation having no legal or factual basis." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418, 420 (1978) (emphasis added). Read together, then, Rule 68 gives private parties an incentive to settle; if they cannot settle, only then does Section 706(k) of Title VII give the trial court the authority to award more complete relief to a party proved to have been wronged.

The courts' concern that a literal reading of Rule 68 will promote token offers of judgment is simply unfounded. Deterrence against token offers is built into the rule itself, for to have any realistic hope of benefiting from the procedure, the defendant must offer at least as much as it anticipates the plaintiff would be likely to recover in a judgment. Moreover, as the court in *Mr. Hanger* intimated, an offer of judgment, if accepted, might constitute an indication of wrongful conduct, 63 F.R.D. at 610. As a public judgment recorded against it,* no defendant, particularly a corporate one that is subject subsequently to individual and class Title VII actions from private individuals and EEOC, as well as compliance proceedings by the Office of Federal Contract Compliance Programs (OFCCP), 41 C.F.R. Part 60, would casually introduce token offers for the uncertain, and perhaps minimal benefits that would flow from cost awards under Rule 68.

* Accepted offers of judgment, because they become judgments, are more onerous than, and should be distinguished from offers of compromise without a finding of liability, Fed. R. Evid. 408, or unaccepted offers of judgment, evidence of which is not admissible except in a proceeding to determine costs. While offers of judgment presumably do not have issue preclusion effect, since issues are not litigated, they nevertheless would be on the public records, and could form a basis for triggering formal investigations by EEOC, OFCCP or State and Local enforcement agencies, or private plaintiffs or their counsel.

Interestingly, Rule 68 and Title VII together have been law for fifteen years, during which virtually all judicial precedent has supported a literal reading of the rule. *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 610 (E.D.N.Y. 1974), *citing Staffend* v. *Lake Central Airlines, Inc.*, 47 F.R.D. 218 (N.D. Ohio 1969); *Nabors* v. *Texas Co.*, 32 F. Supp. 91 (W.D. La. 1940). Recorded instances concerning the rule's application in Title VII cases have been relatively few. *See Dual* v. *Cleland*, 79 F.R.D. 696 (D.D.C. 1978); *See generally*, Schlei and Grossman, *Employment Discrimination Law*, 1145-46 (1976). It thus would appear that defendants have exercised their rights under the rule with, if anything, a realistic degree of circumspection.

Ultimately, we believe, the most compelling reason for reading literally Rule 68 derives from the language itself. The rule need not be construed by injecting content not found otherwise, for the rule is unambiguous. If, as suggested by the Seventh Circuit, the Rule was meant to apply in all cases other than those concerning Title VII, an exception could have been provided for by the rulemakers. *See, e.g.*, Ark. R. Civ. P. 27-1501, which allows offers to be made only in actions for the recovery of money alone. If, as the Seventh Circuit declares, the rule was meant

to be read in the permissive, the rulemakers could have written the rule in the permissive. *See, e.g.*, Cal. Civ. Proc. Code § 998, *cited in Pomeroy v. Zion*, 19 Cal. App. 3d 473, 475, 96 Cal. Rptr. 822, 823 (1971). If good faith intent was meant to be an element in determining the rule's applicability, that too could have been included. See Note *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 896. By its judicial redrafting, the district court and the Seventh Circuit have ventured well beyond the purview of proper rule interpretation.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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July 3, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-814

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER DELTA AIR LINES, INC.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in nullifying the clear and unambiguous, mandatory imposition of costs under Rule 68 of the Federal Rules of Civil Procedure;

2. Whether the Court of Appeals exceeded its authority by rewriting Rule 68;

3. Whether, in any event, the Court of Appeals and the District Court abused discretion by denying costs to the prevailing party under either the "liberal" reading of Rule 68 or the unchallenged reading of Rule 54(d).

THE PARTIES

Plaintiff, Rosemary August, was an employee of defendant, Delta Air Lines, Inc., who claimed that Delta discriminated against her in violation of federal law and further maliciously defamed her to her great damage.

Judgment on the merits was ordered for Delta, but Delta became the appellant below in an appeal from a ruling denying its costs under FED. R. CIV. P. 68.

Delta is here the Petitioner; Ms. August the Respondent.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Jt App pp 2-7)[1] is reported at 600 F 2d 600. The decision of the District Court (Jt App pp 8-14) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1979. On August 28, 1979 Delta's timely petition for rehearing and suggestion for rehearing *en banc* was denied (Jt App p 1). Delta's petition for a writ of certiorari was filed within ninety days thereafter and was granted on April 21, 1980.

STATUTES AND RULES INVOLVED

The relevant provisions of the Rules Enabling Act (28 U S C §§ 2071, 2072), the Civil Rights Act of 1964 (42 U S C § 2000e *et seq*), the Fees Bill Act (28 U S C § 1920), 28 U S C § 1331 and Fed R Civ P 1, 4(a), 30(g)(1) and (2), 37(a)(4), (b)(2)(E), and (d), 41(d), 45(f), 54(d), 56(a), (b), (c) and (g), 68 and 81(a) are set forth in a separate Appendix to this brief.

1 Jt App refers to the Joint Appendix filed with the Court by Delta Air Lines, Inc and Rosemary August as provided in Rule 36 of the Rules of the Court.

STATEMENT OF THE CASE

On January 4, 1977, Rosemary August ("plaintiff") sued Delta Air Lines, Inc. ("Delta") alleging that her employment termination was unlawful under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). Ms. August demanded reinstatement to her flight attendant position, back pay, benefits, other equitable relief, attorneys' fees, and costs (Jt. App. pp. 2-3, 19-20). She also alleged that Delta maliciously defamed her, and thus denied her subsequent employment. Under this count plaintiff sought $150,000 actual and punitive damages (Jt. App. p. 19). Delta denied all substantive allegations.

On May 12, 1977, Delta served upon plaintiff the following offer of judgment (Jt. App. pp. 33-34):

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450 which shall include attorney's fees, together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damage.

Plaintiff declined the offer of judgment and elected to proceed to trial. Thereafter, the District Court granted Delta's Motion for Partial Summary Judgment and dismissed with prejudice plaintiff's defamation claim, plaintiff having acknowledged she could present no facts in support of this allegation (Jt. App. p. 20). After an extended twenty five day trial, the District Court entered judgment in favor of Delta, stating (Jt. App. pp. 24, 32):

> [T]he court has no difficulty in reaching its decision.
>
> * * *
>
> [T]his trial record does not establish that [Delta's] employment practices are racially premised. It further does not support the conclusion Rosemary August was subjected to disparate treatment, either in her employment or termination, because of the fact she is a Negro.

On appeal the Court of Appeals affirmed the judgment of the District Court stating that plaintiff's evidence of discrimination "was superficial, incomplete, inadequate or otherwise defective." (Jt. App. p. 16).

While the District Court awarded judgment to Delta, it nevertheless ordered: "Each party will bear its own costs of litigation." (Jt. App. p. 32). Delta advised the District Court of its offer of judgment and moved the Court to order plaintiff to pay costs under FED. R. CIV. P. 68 ("Rule 68"). On September 18, 1978, the District Court denied the motion holding that the "Rule 68 offer of May 12, 1977 did not constitute an effective offer under that rule. . . ." (Jt. App. p. 12). The District Court apparently weighed the $450 offer against the likelihood it would "fully satisf[y]" the plaintiff's incurred costs in attorneys' fees (Jt. App. p. 12), and concluded that the amount of the offer "could only have been effective were the plaintiff's claim totally lacking in merit. . . ." (Jt. App. p. 12).

The Seventh Circuit affirmed the denial of Delta's Rule 68 motion to recover litigation costs (Jt. App. pp. 2-7). The Court of Appeals rejected the application of a literal reading of Rule 68 to Title VII cases, referring to such as "a technical reading" (Jt. App. p. 7). Instead, the court adopted a discretionary standard and held that in the context of a Title VII case a trial judge may weigh various factors including the timing and "good faith" of the offer, the outcome of the claim, the amount claimed, and the litigation risks involved (Jt. App. p. 7).

SUMMARY OF ARGUMENT

Delta, knowing full well that it had not defamed and had not discriminated against plaintiff, nevertheless made an offer of judgment to plaintiff pursuant to FED. R. CIV. P. 68. The ultimate judgment was for Delta.

Rule 68 provides that if the offeree does not obtain more by judgment than the offer made, the "offeree must pay the costs incurred after the making of the offer." Delta contends that this clear and unambiguous language of Rule 68 requires a mandatory imposition of costs upon the offeree in a situation such as this.

Delta submits that the origin of Rule 68 and its subsequent amendment in 1946 emphasize its mandatory cost shifting prescription. All rules of construction support and confirm the conclusion that Rule 68 mandates the imposition of costs where the offeree ultimately receives less than that which is offered.

The courts below determined that the imposition of costs upon the unsuccessful plaintiff was not mandatory, but remained a matter for judicial discretion, a judicial determination as to whether the offer was reasonable or made in good faith.

Delta avers that the creation of these standards is not only contrary to the clear mandate of the language of Rule 68, but that the engraftment of such conditions upon the rule is not justified by policy, logic or wisdom.

The general concept of every citizen having a right to a day in court is neither denied nor chilled by requiring that citizen to evaluate the merits of his or her claim. The specific policy of providing judicial redress to all victims of discrimination does not justify a license to impose on innocent defendants the rising costs of litigation.

The mandatory cost shifting feature of Rule 68 implements and effectuates its obvious purpose: the certainty that a plaintiff will be liable for subsequent litigation costs if the plaintiff is comparatively unsuccessful at trial will encourage litigants to more closely examine the merits of their positions, thereby encouraging "the just, speedy, and inexpensive determination" of their action (FED. R. CIV. P. 1).

Delta submits that Rule 68 in no way chills a Title VII plaintiff's legitimate access to our judicial system. Rule 68 does impose upon that plaintiff the obligation to realistically evaluate the merits of his or her claim. Delta states to this Court that such an imposition is consistent with and required by policy, logic and wisdom.

Further, Delta urges that the courts below exceeded their authority by usurping the rulemaking powers delegated exclusively by Congress to this Court. By judicial decision, the courts below redrafted Rule 68 (to include conditions upon its cost imposition provision) and amended Rule 81 (by excluding Rule 68 from Title VII cases).

Finally, Delta contends that both under the lower courts' newly conceived discretionary standards of Rule 68, as well as the normal standards of Rule 54(d), Delta was entitled to costs in the instant case.

ARGUMENT

I.

RULE 68 MANDATES THE SHIFTING OF COSTS WHENEVER THE OFFEREE RECOVERS LESS THAN THE OFFER

A. The Language of the Rule Is Clear and Unambiguous

As pointed out by Mr. Justice Powell in *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 756 (1975) (concurring), "the starting point in every case involving construction of a statute is the language itself". Rule 68 states that the offeree *must* pay the costs incurred after the making of the offer if the offeree has received less by way of judgment.

No case has been found in which the word "must" has been interpreted as anything but an imperative. In *Berg v. Merchant*, 15 F. 2d 990, 991 (6th Cir. 1926) *cert. den.* 274 U. S. 738 (1927), the court stated:

> "[T]he word 'must' is so imperative in its meaning that no case has been called to our attention where that word has been read 'may'."

The word "must" is used in only three other Federal Rules of Civil Procedure, and in each case found involving these three rules, the mandatory "must" has been applied in a non-discretionary matter.[2]

2. *Rule 74(a)*

> Otherwise he *must* obtain leave on motion upon notice to all parties. . . .

See State Mutual Life Assurance Company v. Arthur Andersen & Co., 65 F. R. D. 518, 521 (S. D. N. Y. 1975); *Meilinger v. Metropolitan Edison Company*, 34 F. R. D. 143, 145 (E. D. Pa. 1963); 6 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 1454 (Rev. ed. 1973).

(Footnote continued on next page.)

In *Caminetti v. United States*, 242 U. S. 470 (1917), this Court recognized that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the Court is to enforce it according to its terms." *Id.* at 485. That instruction is no less applicable today and is no less applicable to the construction of a rule of procedure than it is to a statute.[3]

On its face Rule 68 denies the validity of the Seventh Circuit's substitution of a discretionary standard for the mandatory cost shifting provision approved by Congress. The language of Rule

(Footnote continued from preceding page.)

Rule 30(a)

> Leave of court, granted with or without notice, *must* be obtained. . . .

See Brause v. Travelers Fire Insurance Co., 19 F. R. D. 231, 234 (S. D. N. Y. 1956); *Park & Tilford Distillers Corp. v. Distillers Co.*, 19 F. R. D. 169, 171 (S. D. N. Y. 1956); 8 WRIGHT & MILLER, *supra* at § 2104.

Rule 56(e)

> When a motion for summary judgment is made . . . an adverse party . . . *must* set forth specific facts. . . .

See *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 160 (1970); *Macklin v. Butler*, 553 F. 2d 525, 528 (7th Cir. 1977); *Felix v. Young*, 536 F. 2d 1126, 1135 (6th Cir. 1976); *Turoff v. May Co.*, 531 F. 2d 1357, 1362 (6th Cir. 1976); *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F. 2d 102, 109 (2nd Cir. 1975); *Stevens v. Barnard*, 512 F. 2d 876, 878 (10th Cir. 1975); *Brown v. Ford Motor Co.*, 494 F. 2d 418, 420 (10th Cir. 1974); *Pace v. Southern Express Co.*, 409 F. 2d 331, 334 (7th Cir. 1969); *Town House, Inc. v. Paulino*, 381 F. 2d 811, 814 (9th Cir. 1967); *Liberty Leasing Co. v. Hillsum Sales Corp.*, 380 F. 2d 1013, 1015 (5th Cir. 1967); *Foy v. Norfolk & Western Railway Co.*, 377 F. 2d 243, 246 (4th Cir. 1967); *Fowler v. Southern Bell Telephone & Telegraph Co.*, 343 F. 2d 150, 154 (5th Cir. 1965).

3. It has long been recognized that the Federal Rules of Civil Procedure "have the force and effect of statutes." *Winor v. Daumit*, 179 F. 2d 475, 477 (7th Cir. 1950).

68 is clear and unambiguous and should be so interpreted. To do otherwise is to ignore the imperative "must," thereby eviscerating the rule.

B. The History of Rule 68 Confirms the Clarity of Its Mandate

Offers of judgment were first introduced into the federal judicial system in 1938, the Advisory Committee Notes offering no explanation other than the citation of certain state statutes which already provided for offers of judgment and the mandatory shifting of costs.[4] While only Minnesota, Montana, and New York were cited, several other states had established procedures for offers of judgment prior to 1938.[5]

State court decisions rendered pursuant to the respective state procedures clearly reveal that a non-discretionary imposition of costs was applied under said procedures. In New York, a state cited by the Advisory Committee, it was held that cost shifting was mandatory. *Kanney* v. *Russel*, 3 Duer 689, 690 (Super. Ct. N.Y. 1854); *Marquis* v. *Soloman & Berck*, 223 A.D. 634, 229 N.Y.S. 157 (App. Div. 1928). Similar statutes were interpreted in the same manner in Nebraska (*Wachsmuth* v. *Orient Insurance Co.*, 49 Neb. 590, 68 N.W. 935 (1896)), in

4. *See* Dobie, *The Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 303 (1939); 12 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001 (Rev. Ed. 1973).

5. *See, e.g.* California—Cal. Proc. Code § 997 (West Supp. 1978); Colorado—*Yeager* v. *Campion*, 70 Colo. 183, 197 P. 898 (1921); Connecticut—*Wordin* v. *Remis*, 33 Conn. 216 (1866); Indiana—*Prather* v. *Pritchard*, 26 Ind. 65 (1866); Kansas—*West* v. *Springfield Fire & Marine Ins. Co.*, 104 Kan. 157, 185 P. 12 (1919); Nebraska—*Wachsmuth* v. *Orient Ins. Co.*, 49 Neb. 590, 68 N.W. 935 (1896); Nevada—*Herring-Hall-Marvin Safe Co.* v. *Balliet*, 44 Nev. 94, 190 P. 76 (1920); Oregon—*Hammond* v. *Northern Pac. R. Co.*, 23 Or. 157, 31 P. 299 (1892); South Dakota—*Sioux Falls Adjustment Co.* v. *Penn Soo Oil Co.*, 53 S.D. 77, 220 N.W. 146 (1928); Wisconsin—*Newton* v. *Allis*, 16 Wis. 210 (1862).

Nevada (*Herring-Hall-Marvin Safe Co.* v. *Balliet*, 44 Nev. 94, 190 P. 76 (1920)), and in South Dakota (*Sioux Falls Adjustment Co.* v. *Penn Soo Oil Co.*, 53 S.D. 77, 220 N.W. 146 (1928)). In *Hammond* v. *Northern Pac. R. Co.*, 23 Ore. 157, 31 P. 299 (1892), the Oregon Supreme Court stated: "[U]nless the plaintiff accept [the offer], or recover a more favorable judgment, the defendant is entitled to costs accruing subsequent to such offer." 31 P. at 301.

The citation of existing similar statutes by the drafters of Rule 68 is evidence that they intended it to operate in the federal courts as it had in the various states; thus, an automatic, non-discretionary operation was dictated.

Furthermore, in 1946 Rule 68 was amended. Of compelling significance is the fact that the language requiring an unsuccessful offeree to pay costs was changed at that time from "*shall* pay costs" to the present language of "*must* pay costs". (Jt. App. p. 35).[6]

6. The Advisory Committee Notes to the 1948 amendments do not specifically discuss this change from "shall" to "must". However, in the Report of the Advisory Committee on the Proposed Amendments to the Rules of Civil Procedure (reproduced in 5 F.R.D. 433 (1946)) it is stated with respect to Rule 68 that "[defendant's] first and only offer will operate to save him the costs from the time of the offer if the plaintiff ultimately obtains a judgment less than the sum offered." 5 F.R.D. at 482. Further, a First Draft of the Advisory Committee (submitted by Walter P. Armstrong as "Proposed Amendments To Federal Rules For Civil Procedures" and reproduced in 4 F.R.D. 124 (1946)) indicated that Rule 68 was changed to "remove ambiguities" and stated that the amended provision would provide that "no costs shall be recoverable by the offeree which were incurred after the making of an offer equal to or greater than the judgment finally obtained by the offeree, and that he should pay costs from the time of such offer." 4 F.R.D. at 126. Additionally, in the final Recommendations of the Advisory Committee (submitted by Walter P. Armstrong and reproduced at 5 F.R.D. 339 (1946)), the changes in Rule 68 are discussed in the section titled "Ambiguities Resolved and Unresolved," wherein the

(Footnote continued on next page.)

It is impossible to perceive of a more clear expression of the intention of the drafters of Rule 68. A discretionary operation was neither envisioned nor drafted.

C. The Comparison of Rule 68 Language to Other Relevant Regulatory and Statutory Language Confirms Its Mandatory Character

The courts below held that Rule 68 did not mandate the shifting of costs, finding instead that the shifting of costs would be determined by the court depending upon whether it deemed the offer reasonable or made in good faith. Thus, the courts below construed Rule 68 as permitting the exercise of judicial discretion.

However, in other federal rules which pertain to costs of litigation, where discretion is intended words of discretion are used rather than the imperative word "must". Thus, Rules 30 (g)(1) and (2) provide that parties failing to attend or to serve subpoenas "may" be ordered to pay the attending party reasonable expenses and attorney's fees.[7] In contrast, Rule 68 provides that costs "must" shift to a plaintiff who recovers less than the offer of judgment.

Rule 41(d) provides that a defendant served with a previously dismissed action may recover costs of the action previously dismissed "as [the court] *may* deem proper." If the Rule 68 cost shifting provision were subject to a similar discretionary standard it would have been so drafted.

(Footnote continued from preceding page.)

sentence changing "shall" to "must" is quoted. 5 F.R.D. at 450. While the comments and intentions of the Advisory Committee are not binding, they are entitled to some weight in interpreting the Federal Rules. *See Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

7. The Federal Rules of Civil Procedure cited in this and the following paragraphs are reprinted in an Appendix attached to this brief for convenience. References in this brief to "Rule ____" are, unless otherwise indicated, to the Federal Rules of Civil Procedure.

Congress has preserved the distinction between the meaning of "may" and "must" in the drafting of other statutes as well. In 28 U.S.C. § 1331 (1970), it is provided that where a plaintiff is adjudged to be entitled to less than the jurisdictional prerequisite amount of $10,000, "the district court *may* deny costs to the plaintiff and, in addition, *may* impose costs on the plaintiff." The obvious reason for this provision was to discourage suits for less than the requisite amount. *A. J. McKee, Inc. v. Schoonveld*, 341 F.2d 737 (10th Cir. 1965). However, Congress left it to the discretion of the trial court as to whether a plaintiff in such a case should be ordered to pay the costs by use of the permissive "may". *Gordon v. Longest*, 41 U.S. (16 Peters) 97 (1842).[8]

Similarly, when Congress intended that other considerations, such as financial strain or mitigating circumstances should play a role in the apportioning of litigation costs, it explicitly set forth the relevant considerations. For example, Rule 45(f) limits judicial authority to deem a refusal to obey a subpoena a contempt of court by requiring that the court consider the adequacy of the excuse. Rules 37(a)(4), (b)(2)(F), and (d), provide that discovery sanctions in the form of "reasonable expenses . . . including attorney's fees" are to be awarded "unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." If the fiscal adequacy of a Rule 68 offer were relevant in determining whether the rule's requirements were otherwise met, language identical or similar to that drafted in Rule 45(f) or Rule 37 would have been used. To the contrary, the 1946 amendment to Rule 68 is an unusually demonstrative indication

8. Moreover, the word "may" is used three times in Rule 68. It is a fundamental principle of statutory construction that "[w]here both mandatory and directory verbs are used in the same statute, . . . it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meaning." 2A SUTHERLAND STATUTORY CONSTRUCTION § 57.11 (4th ed. 1973).

that this rule is and was intended to be a *mandatory* cost shifting provision. The application and operation of this rule was not intended by the framers to depend upon judicial discretion. The Court of Appeals improperly disregarded unmistakable intent implemented in unequivocal language in the instant case.

There is likewise no warrant for the "bad faith" standard implicitly engrafted upon Rule 68 by the courts below. Not only is there no basis in the record for implying that Delta's offer was made in bad faith, there is no basis for the application of a "bad faith" standard to Rule 68 in any event. Rule 68 sets forth only one standard – a comparison between the offer and the offeree's eventual recovery. If the offer is greater than the recovery, the offeree pays the offeror's costs from the date of the offer.

When Congress intended a "bad faith" standard to apply, it has so stated. For example, Rule 56(g) provides that recovery of expenses and attorney's fees is authorized when it appears to the satisfaction of the court that affidavits in summary judgment matters "are presented in bad faith." But nowhere in Rule 68 do the terms "good faith" or "bad faith" appear.[9] The recognized authorities on the Federal Rules agree that Rule 68 is a non-discretionary cost shifting provision. 12 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3005 (Rev. ed. 1973) ("If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."); 7 Pt. 2 MOORE'S FEDERAL PRACTICE ¶ 68.06 (1979) ("[defendant's] first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered.").

9 If, as the District Court implies (Jt. App. p. 12), the language of the Court in *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974) engrafts a bad faith standard in determining whether a "proper offer is made," it is inconsistent with

(Footnote continued on next page.)

The fact that Congress changed the language of Rule 68 in 1946 to ensure that its application was mandatory and has subsequently not changed the language constitutes a legislative judgment which cannot be judicially disregarded or repealed. Mandatory cost shifting is an integral yet distinct part of the comprehensive procedural system carefully designed to secure "the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. The courts below improperly dismantled the grand design by removing the essential element of certainty in Rule 68. This is the incentive upon which the effective operation of Rule 68 depends. Only if the litigating parties know that costs will shift will offers of judgment be encouraged and will plaintiffs realistically review their cases before going to trial. Delta merely asks this Court to apply the plain meaning of the very language it adopted pursuant to the rulemaking authority delegated to it by Congress in the Enabling Act of 1934, 28 U.S.C. §§ 2071, 2072 (1970).[10]

(Footnote continued from preceding page.)

the single comparative standard expressly provided in Rule 68. The *Mr. Hanger* court properly recognized that Rule 68 is a mandatory cost shifting provision. ("It cannot be questioned that the rule itself is couched in mandatory terms. . . ." 63 F.R.D. at 610). The court's discussion of bad faith came as a result of plaintiff's claim that the offer was a "sham". No such claim was or can be advanced on the record in this case.

10 All other federal cases interpreting Rule 68, while not directly addressing the issue raised herein, have implicitly accepted the automatic, non-discretionary operation of Rule 68. *See, e.g., Truth Seeker Co., Inc.* v. *Durning*, 147 F.2d 54, 56 (2nd Cir. 1945); *Stallend* v. *Lake Central Airlines, Inc.*, 47 F.R.D. 218, 219-20 (N.D. Ohio 1969); *Maguire* v. *Federal Crop Insurance Corp.*, 9 F.R.D. 240, 242 (W.D. La. 1949), *rev'd in part on other grds.*, 181 F.2d 320 (5th Cir. 1950); *Nabors* v. *Texas Co.*, 32 F. Supp. 91, 92 (W.D. La. 1940); *see also* 12 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3005 (Rev. ed. 1973). Further, in federal cases which have mentioned Rule 68 either in comparative contexts or without any explication of its operation, no indication is

(Footnote continued on next page.)

D. The Decisions Below Nullify the Intersectional Harmony Between Rule 68 and Other Rules Dealing with Costs and Pretrial Resolution

By imposing a discretionary standard upon the mandatory cost shifting language of Rule 68, the Court of Appeals merged Rule 68 and Rule 54(d). Because this unsupportable consequence violates settled principles of construction and overrules the manifest intent of the framers of Rule 68, the decision below must be reversed.

This Court has assiduously preserved the individual integrity of each federal rule, recognizing that each rule plays a particular role in securing "the just, speedy, and inexpensive determination of every action." *See Hanna* v. *Plumer*, 380 U. S. 460 (1965); *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964); *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941). Consistent with this principle, federal trial courts have uniformly adopted the principle of intersectional harmony. "Each separate rule is related to the general plan of the others and must be so construed." *United States* v. *Purdome*, 30 F. R. D. 338, 339 (W. D. Mo. 1962); *accord, Mahler* v. *Drake*, 43 F. R. D. 1, 3 (D. S. C. 1967). Delta contends that properly harmonized, Rule 68 eliminates the discretion governing cost awards which is availabie to the courts under Rule 54(d).[11]

(Footnote continued from preceding page.)
given therein of a discretionary application. *See, e.g., Mason* v. *Belieu*, 543 F. 2d 215 (D. C. Cir.) *cert. denied*, 429 U. S. 852 (1976); *Thomas* v. *Trans World Airlines, Inc.*, 457 F. 2d 1053 (3d Cir. 1972); *Scheriff* v. *Beck*, 452 F. Supp. 1254 (D. Colo. 1978); *Read* v. *Baker*, 438 F. Supp. 737 (D. Del. 1977), *aff'd.*, 577 F. 728 (3d Cir.), *cert. denied*, 439 U. S. 869 (1978); *Perkins* v. *New Orleans Athletics Club*, 429 F. Supp. 661 (E. D. La. 1976); *Honea* v. *Crescent Ford Truck Sales*, 394 F. Supp. 201 (E. D. La. 1975).

11. *Simonds* v. *Guaranty Bank & Trust Co.*, 480 F. Supp. 1257, 1261 (D. Mass. 1979) ("Indeed, Rule 68 is by nature a restriction
(Footnote continued on next page.)

This contention obtains its premise directly from Rule 54(d). On its face, Rule 54(d) denies the priority over Rule 68 granted it by the courts below; indeed, Rule 54(d) is subordinate to Rule 68. *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110, 113 (N. D. Cal. 1979). Rule 54(d) provides in pertinent part:

> "*Except when express provision therefor is made . . . in these rules*, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." (Emphasis added)

Rule 68 is nothing if not such an express provision; it requires mandatory recovery of costs in cases where an offer of judgment is made and the offeree recovers less than the offer. In this one circumstance Rule 68 limits the scope of and supersedes Rule 54(d). In all other cases, Rule 54(d) applies. The language "except when express provision thereof is made . . . in these rules" creates the operational distinction between these rules; this distinction was improperly merged, and thereby nullified, by the courts below. This specific caveat preserves the design of the framers, and thereby allows each rule to operate freely and independently within its separate sphere. The courts below erroneously applied discretion to a non-discretionary rule, there-

(Footnote continued from preceding page.)
of that [Rule 54(d)] discretion since it mandates an award of costs when its terms are met."); *see also Dual* v. *Cleland*, 79 F. R. D. 696 (D. D. C. 1978). There an employee of the Veteran's Administration sued alleging race discrimination in the denial of a promotion. Before trial the government defendants made a Rule 68 offer. Plaintiff rejected the offer, proceeded to trial and, as in the instant case, had her claim dismissed on the merits. As part of his dismissal order Judge Richey ordered that each party bear its own costs. Thereafter, the federal defendants brought to the judge's attention the fact that a Rule 68 offer had been made. After contrasting Rule 54(d) with Rule 68, Judge Richey stated:

> "Rule 68 automatically charges the plaintiff with the defendant's costs incurred after an offer of judgment. . . . The plain language of the rule eliminates the Court's discretion." 79 F. R. D. at 697.

by subordinating Rule 68 to Rule 54(d) and denying Rule 68 the specific means chosen by the framers to effectuate Rule 1.

Rule 68 also supplements Rules 56(a) and (b) of the Federal Rules. These latter rules, like Rule 68, reduce the costs of litigation and conserve limited judicial time, but through a different technique. Summary judgment motions compel disclosure of the merits of the case thereby eliminating continuing litigation where the merits of the claim can be decided without trial. This means of eliminating trial litigation is not permitted where a material fact issue exists. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 159-60 (1970); *Willetts* v. *Ford Motor Co.*, 583 F. 2d 852, 853-4 (6th Cir. 1978). When summary judgment is not available, Rule 68 provides the defendant with a means of avoiding the costs of trial. The decisions of the courts below deprive all defendants of this complementary method for pre-trial resolution.[12] Preservation of Rule 68's role as a primary means of avoiding costly and time-consuming trials is particularly important in Title VII cases. Promotional, hiring, and certainly discharge discrimination claims almost invariably involve fact questions which cannot be satisfactorily resolved by affidavit. *See McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). An offer of judgment notices a plaintiff of potential cost liability if the final judgment is less than the offer. By rejecting the offer the plaintiff freely assumes the risk, and there is no persuasive policy reason why the plaintiff should be relieved of the known consequence of his or her own conduct. When the plain meaning of the mandatory language is recognized and applied, Rule 68 effectuates the policy of Rule 1 and provides a functional alternative to protracted litigation where Rule 56 motions are futile.

12. Indeed, if the courts below are reversed, the use of Rule 68 may reduce the number of inappropriate summary judgment motions now flooding the federal district courts. "All too often, unfortunately, counsel have made utterly unjustified summary judgment motions." 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2712 (Rev. ed. 1973).

Rule 68 as drafted by the framers plays an important, albeit not widely utilized, part in the Federal Rules. Its purposes are two-fold: to encourage settlements and thereby avoid protracted litigation, and, where the litigation goes forward, "to fix responsibility for costs thereafter." *Staffend* v. *Lake Central Airlines, Inc.*, 47 F. R. D. 218, 219 (N. D. Ohio 1969); *Nabors* v. *Texas Co.*, 32 F. Supp. 91, 92 (W. D. La. 1940). Rule 68 implements Rule 1 by providing a plaintiff with a certain financial incentive to avoid protracted litigation. It is precisely because Rule 68 mandates cost shifting that a plaintiff is encouraged to give his or her claims greater pretrial scrutiny than might be made when no offer of judgment is made. Rule 68 discourages marginal litigation, thereby securing the injunction of Rule 1, particularly the "speedy and inexpensive determination of every action." *See Herbert* v. *Lando*, 441 U. S. 153, 177 (1979); *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227, 234 (1964).

By its construction of Rule 68, the Court of Appeals has not only rendered Rule 68 essentially duplicative of Rule 54(d), it has nullified the intersectional harmony of the various rules of procedure. This result is manifestly contrary to the framers' intent and, accordingly, must be reversed.

E. The Court of Appeals Erred in Creating an Exception to Rule 68 for Title VII Plaintiffs.

The Court of Appeals, without analysis, based its affirmance of the District Court opinion in part on its perception that a contrary ruling would have a "chilling effect" on Title VII plaintiffs (Jt. App. p. 6).

The proper application of Rule 68 does not, and cannot, chill a meritorious claim; it does and can only provide a plaintiff with a speedy and efficient resolution of his or her claim. The disapproval of procedures which inhibit plaintiffs from bringing Title VII actions stems from the public policy

against unlawful employment discrimination. The purpose of the policy, however, is not to encourage frivolous litigation but to assist unsophisticated plaintiffs in the initiation of Title VII lawsuits. Rule 68 does not contravene the policy because it does not affect the initiation of litigation. Its limited purpose does not take effect until *after* suit is filed. Rule 68 does not deter the initial resort to litigation; rather, it provides a monetary incentive to the plaintiff to review the claim realistically in light of the offer.

The Court of Appeals' fear of a chilling effect on Title VII plaintiffs resulted from its failure to define properly the limited purpose of Rule 68. In fact, there is no persuasive basis for nullifying Rule 68's legitimate and salutary purpose because of a principle of judicial access which the rule in no way affects. Congress has not seen fit to guarantee Title VII plaintiffs riskless and expense-free litigation. The public policy behind Title VII may encourage individuals to initiate suits, but it does not include a guarantee of success. Where the risk of litigation is freely assumed, Rule 68 operates to reimburse a defendant who has no control over the plaintiff's choice to proceed to trial but who attempts to influence that decision in favor of settlement through an offer of formal judgment against the defendant.

An obstinate plaintiff who nevertheless proceeds to trial assumes the normal risk of lack of success. Rule 68 operates in conjunction with this normal litigation risk by shifting costs only on the basis of the result of trial and, even then, only as to costs which are incurred after the offer is made. The rule clearly does not discourage the initiation of litigation but it does provide that once a claim is filed, the Title VII plaintiff, like any other litigant, must realistically assess the chances of recovering more from the defendant at trial than the defendant offers by judgment. Rule 68 thereby preserves incentives for plaintiffs to accept an offer of judgment and avoid protracted litigation without "chilling" resort to the court in the first instance.

II.

BY ITS ADMITTED REWRITING OF RULE 68, THE COURT OF APPEALS EXCEEDED ITS AUTHORITY

By inferentially interpreting the word "must" to mean "may", the Court of Appeals has improperly rewritten Rule 68.

A. The Supreme Court Has Primary Responsibility for Promulgating the Federal Rules

Congress, by the enactment in 1934 of the Rules Enabling Act, U. S. C. § 723 b *et seq.* (current version at 28 U. S. C. §§ 2071, 2072 (1970)), empowered this Court to promulgate rules of practice and procedure in the district courts.[13] Upon taking effect, the Federal Rules of Civil Procedure acquire the force of federal statutes, controlling all district courts. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 13 (1941); *United States* v. *Brandt*, 8 F. R. D. 163, 165-64 (D. Mont. 1948); *C. J. Wieland & Son Dairy Products Co.* v. *Wickard*, 4 F. R. D. 250, 252 (E. D. Wis. 1945).

13. Sections 1 and 2 of that Act, as amended (28 U. S. C. §§ 2071, 2072), provide in pertinent part:

> § 2071. Rule-making power generally
>
> The Supreme Court . . . may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.
>
> § 2072. Rules of civil procedure
>
> The Supreme Court shall have the power to prescribe by general rules, the forms of . . . motions, and the practice and procedure of the district courts . . . of the United States in civil actions. . . .
>
> • • •
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof. . . .

The proper construction and application of the Federal Rules have traditionally been a subject of great concern to this Court. See, e.g., *Schlagenhauf v. Holder*, 379 U. S. 104, 111 (1964); *La Buy v. Howes Leather Co.*, 352 U. S. 249, 256 (1957); *Los Angeles Brush Manufacturing Co. v. James*, 272 U. S. 701, 706 (1927). Indeed this Court has manifested its responsibilities with respect to the rules by allowing the extraordinary writ of mandamus to issue where a lower court has acted in derogation of the rules. In *Los Angeles Brush Mfg.*, Chief Justice Taft for a unanimous Court stated:

> [W]e think it clear that where the subject concerns the enforcement of the . . . rules which by law it is the duty of this court to formulate and put in force . . . it may use its power of mandamus and deal directly with the district court in requiring it to conform to them. 272 U. S. at 706.

Schlagenhauf v. Holder, 379 U. S. at 111; *La Buy v. Howes Leather Co.*, 352 U. S. at 256.

The instant case represents the first substantive construction of the cost shifting provisions of Rule 68 by a court of appeals. The Seventh Circuit's interpretation has resulted in its decision now to follow the rule as written. While district and circuit courts unquestionably have the right to interpret the rules, they have no authority to effectively nullify or extirpate them. The Court of Appeals exceeded its authority and this Court should remedy that usurpation.

B. Rewriting of the Rules Should Be Done by Legislation, Not Judicial Interpretation

Under the guise of interpretation, the Court of Appeals has admittedly redrafted Rule 68. Without regard to the policy arguments for or against a mandatory construction and operation of the rule in a Title VII context, the lower courts have erroneously encroached upon the legislative function. This Court has consistently held that fundamental changes in the Federal Rules are subjects for rulemaking, not judicial decision. Thus,

in *Harris v. Nelson*, 394 U. S. 286, 299 (1969), this Court stated:

> We have no power to rewrite the Rules by judicial interpretation. . . . 394 U. S. at 298. And in *United States v. Robinson*, 361 U. S. 220, 229 (1960), in a case involving interpretation of Federal Rules of Criminal Procedure 32(a) and 52(b), this Court stated:
>
> > [S]uch practical policy arguments may be made both for and against greater flexibility. . . . It is indeed evident that that policy question, involving as it does many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. 361 U. S. at 229.

Further in *United States v. Johnston*, 268 U. S. 220, 227 (1925), in response to the Government's argument that the strict and prescribed procedures and rules operative in admiralty proceedings were in need of revision, Mr. Chief Justice Warren declared for a unanimous Court:

> The Government contends that . . . the rule has become an anachronism and is out of line with the practice in other courts and with the general rules of practice for federal courts. But it should be observed that, where the procedure has been changed in this regard, it has been the result of legislation or rulemaking and not the decisional process. . . . We think that if the law is to change it should be by rulemaking or legislation and not by decision. 268 U. S. at 227-28.

The conclusion of this Court in *United States v. Robinson*, 361 U. S. 220 (1960), is particularly compelling herein. However one may see the proper resolution of the policy questions involved, it was beyond the power of the Court of Appeals to resolve it. 361 U. S. at 229.

C. Rule 68 Contains No Exceptions and Rule 81(a) Does Not Exempt Title VII Actions from the Federal Rules

The underlying litigation in this case was of a civil nature, jurisdiction based upon Title VII of the Civil Rights Act

of 1964, as amended. Private discrimination actions under Title VII can only be maintained in the federal courts. 42 U. S. C. § 2000e-5(f)(3). However, no provision in the Civil Rights Act of 1964, as amended, precludes the application of Rule 68 to this express grant of federal court jurisdiction. Suits by allegedly aggrieved claimants under Title VII are not within any of the specific federal rules exclusions set forth in Rule 81(a). In the absence of express statutory displacement, the Federal Rules apply by their own force to "all suits of a civil nature" in federal district courts. FED. R. CIV. P. 1. Given the inclusive language of Rule 1, legislative silence means that Rule 68 applies to Title VII actions. Indeed, this Court has recently had occasion to comment upon the applicability of the Federal Rules to Title VII cases: "We by no means suggest that the Federal Rules are inapplicable to the EEOC's § 706 actions." *General Telephone Co. v. EEOC*, ... U. S. ....., 48 U. S. L. W. 4513, 4517, n. 16 (1980) (FED. R. CIV. P. 23 inapplicable to EEOC initiated suits because such suits are not class actions as defined by the rule.)

That Congress intended Rule 68 to apply to private Title VII actions is particularly compelling because Congress is ultimately responsible for the adoption of all federal rules. Congressional awareness is not merely a negative inference supported by silence. On the contrary, it is an affirmative presumption that since 1938 Congress has been alert to the content of each rule because Congressional approval is a prerequisite to implementation under the Rules Enabling Act of 1934.[14] Where Congress expresses no reservation over the language or operation of a particular rule, nor otherwise exempts its application to a class of cases, uniformity and certainty must prevail. The Seventh Circuit early recognized this conclusion compelled by the Enabling Act's procedure. "That Congress was familiar with

14. As amended in 1950, rule changes adopted by this Court become effective 90 days after submission to Congress absent adverse action. 28 U. S. C. § 2072 (1970).

the rules as transmitted to it, must at least be assumed." *Sibbach v. Wilson & Co.*, 108 F. 2d 415, 417 (7th Cir. 1939), *aff'd in pertinent part*, 312 U. S. 1 (1941). But, unfortunately, the Seventh Circuit forgot to heed its own admonition in the instant case.

More specifically, this Court has rejected arguments that particular kinds of cases warrant dispensations from the unambiguous requirements of the Federal Rules. Thus, in *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156 (1974), in a case interpreting the requirements of Rule 23(c)(2), this Court stated:

> "The short answer to these arguments is that individual notice . . . is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." 417 U. S. at 176.

And in *First National Bank of Arizona v. Cities Service Co.*, 391 U. S. 253, 289-90 (1968), this Court explicitly rejected the suggestion that Rule 56(e) should, in effect, be read out of antitrust cases.

The inescapable conclusion from Congress' awareness of Rule 68 and its failure to supersede expressly its application to private Title VII suits is that Rule 68 applies to Title VII actions.[15] We submit that the courts below should have recognized and applied the clear and unambiguous language of Rule 68, and should not have attempted to engraft a judicially created Title VII exception upon the clear mandate of the rule.

15. See *Dual v. Cleland*, 79 F. R. D. 696 (D. D. C. 1978), where Judge Richey properly applied Rule 68 to a private Title VII lawsuit.

III.

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DENYING DELTA RECOVERY OF LITIGATION COSTS

Assuming, *arguendo*, that Rule 68 could be construed as permitting judicial discretion in awarding costs, Delta is nevertheless entitled to recover its litigation costs in this case.

Even if the courts below were correct in imposing a good faith test, or a reasonableness test, upon the application of Rule 68, it cannot be disputed that Delta's offer was made in good faith, and, as events proved, was reasonable. Good faith is a measure of the offeror's motivation and intent, and when Delta knew it had violated no law and nevertheless made an offer of judgment, its good faith should be beyond question. As to reasonableness, that concept also may only be measured in terms of the results, not the expectations of litigation; the resultant judgment proved that Delta's offer was more than reasonable.

Furthermore, putting Rule 68 aside, Section 706(k) of Title VII codifies the American Rule by awarding costs to the prevailing party and Rule 54(d) recognizes that costs should be allowed *"as of course"* to the prevailing party unless otherwise directed by the court. Here the defendant is the prevailing party as plaintiff's Title VII case was dismissed on the merits. While Rule 54(d) and Section 706(k) are permissive and reserve cost awards for the trial court's discretion, in order to justify a denial of costs there must be a showing that the prevailing party should be penalized. *See Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1 (7th Cir. 1949), *cert. den.* 338 U. S. 948 (1950); *accord, Lichter Foundation, Inc.* v. *Welch*, 269 F. 2d 142, 146 (6th Cir. 1959). In the instant case neither the trial court nor the Court of Appeals suggested Delta conducted its defense at trial in bad faith or inflated costs, or introduced

irrelevant defenses or issues. And, although Delta's initial conclusion was that it had neither defamed Ms. August nor terminated her for any reason except good cause (a judgment confirmed at trial and on appeal), Delta offered Ms. August $450 above what it believed she deserved in order to avoid trial costs. No reasonable basis, as defined by traditional notions of sound discretion, exists for the denial of costs in this case. There was no reason given, no showing whatsoever, as to why Delta should have been denied costs "as of course."

In *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), this Court noted that a vigorous defense is as important an element in a fair adversary system as a vigorous prosecution. 434 U. S. at 419. Congress was concerned that *reasonable* claims be brought to the judicial system. Unless costs can be recovered, practically the entire burden of Title VII litigation is carried exclusively by the defendant. The adversary system is transformed into a capitulation system where the plaintiff enjoys substantial incentives to sue and the defendant suffers under a substantial disincentive to defend. Such an untoward result was not intended by the framers of Rules 54(d) and 68 nor by the drafters of Title VII.

CONCLUSION

We submit that for the reasons stated above, the denial of costs to Delta under the circumstances here involved constituted a clear violation of the mandate of Rule 68. We believe that the lower courts erroneously assumed the authority to rewrite the rule, and did so without logical or legal justification. Finally, we submit that, in any event, the denial of costs to Delta constituted an abuse of discretion by the trial court under Rule 54(d).

Delta asks this Court to remand this case to the Court of Appeals with directions to return it to the District Court for proceedings consistent with the granting of Delta's Rule 68 motion for an order compelling costs to be paid it and to accept a bill of costs submitted pursuant thereto, as defined in 28 U.S.C. § 1920 (1970). Further, Delta asks that the costs of all appeals be taxed against plaintiff.

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Appendix

APPENDIX TO BRIEF FOR PETITIONER DELTA AIR LINES, INC.

APPENDIX A

§ 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. As amended May 24, 1949, c. 139, § 102, 63 Stat. 104.

§ 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall

in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

As amended May 24, 1949, c. 139, § 103, 63 Stat. 104, July 18, 1949, c. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174, § 2, 64 Stat. 158, July 7, 1958, Pub.L. 85-508, § 12(m), 72 Stat. 348; Nov. 6, 1966, Pub.L. 89-773, § 1, 80 Stat. 1323.

APPENDIX B

Title VII of the Civil Rights Act of 1964
42 U. S. C. § 2000(e) *et seq.* as Amended

* * * * *

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement which the person aggrieved is a party, the Commission, or the Attorney General

in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intevene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) of (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * * * * *

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

APPENDIX C

§ 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

APPENDIX D

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

As amended July 25, 1958, Pub. L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, Pub. L. 94-574, § 2, 90 Stat. 2721.

APPENDIX E

Rule 1.

Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.

APPENDIX F

Rule 14.

Third-Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

APPENDIX G

Rule 30.

Depositions Upon Oral Examination

(a) When Depositions May be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

* * * * *

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the

party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

As amended Jan. 21, 1963, eff. July 1, 1963; March 30, 1970, eff. July 1, 1970; March 1, 1971, eff. July 1, 1971; Nov. 20, 1972.

APPENDIX H

Rule 37.

Failure to Make Discovery: Sanctions

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

* * * * *

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

* * * * *

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify

on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * * * *

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees,

caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

APPENDIX I

Rule 41

TRIALS

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968.

APPENDIX J

Rule 45

Supboena

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; March 30, 1970, aff. July 1, 1970.

APPENDIX K

Rule 54.

Judgments; Costs

* * * * *

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

As amended Dec. 27, 1946, eff. March 19, 1948; Apr. 17, 1961, eff. July 19, 1961.

APPENDIX I.

Rule 56.

Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

* * * * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

* * * * *

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

APPENDIX M

Rule 68.

Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

As amended Dec. 27, 1947, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.

APPENDIX N

Rule 81.

Applicability in General

(a) To What Proceedings Applicable.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10 U. S. C. §§ 7651-7681. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U. S. C., except in so far as they may be made applicable thereto by rules promulgated by Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia.

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U. S. C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.

(3) In proceedings under Title 9, U. S. C. relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise

provided by statute or by rules of the district court or by order of the court in the proceedings.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), U. S. C. Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, U. S. C., Title 7, § 499g(c), for instituting proceedings in the United States district courts to review order of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), U. S. C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat. 31), U. S. C., Title 15, § 715d(c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules as far as applicable.

(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, c 372, §§ 9 and 10 (49 Stat. 453), as amended, U. S. C., Title 29, §§ 159 and 160, for beginning and conducting proceedings to enforce order of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U. S. C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 27, 1952, c. 477, Title III, c. 2, § 340 (66 Stat. 260), U. S. C., Title 8, § 1451, remain in effect.

(7) Abrogated, April 30, 1951, eff. 1, 1951.

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IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM 1980

DELTA AIR LINES, INC.,
Petitioner,

v.

ROSEMARY AUGUST,
Respondent.

BRIEF OF AMICUS CURIAE

This brief is filed pursuant to Supreme Court Rule 36. Consent has been obtained from both petitioner and respondent to file the brief and written confirmation of that consent has been lodged with the Court.

II.

INTEREST OF THE AMICI

The American Association of University Women, Equal Rights Advocates, the National Organization for Women Legal Defense and Education Fund, Washington Women United, and the Northwest Women's Law Center are organizations seeking to ensure that women may realize their full potential in all walks of American life. These organizations support and participate in Title VII litigation, assisting women and racial and ethnic minorities in establishing their right to be free of unlawful employment discrimination. Because this unlawful discrimination is by nature class-based and requires class-wide relief, the Title VII litigation frequently proceeds through class action under Federal Rule of Civil Procedure 23.

In the case before the Court, respondent August has made no class claims.

However, arguments made by petitioner Delta Air Lines, Inc. that Rule 68 is mandatory and applies necessarily to all Title VII actions appear to call for a decision by the Court affecting Title VII class actions as well as the instant case.

Amici submit that a decision so broad would foster conflicts of interest in the prosecution of Title VII class actions, render the class attorney unable to fairly carry out her duties to absent class members, and deprive the court of its authority to effectively supervise the settlement process. These effects are incompatible with the requirements of Rule 23.

Amici concur with respondent and with amicus Lawyer's Committee for Civil Rights Under Law to the effect that the Congressional purpose in enacting Title VII and the Congressional scheme envisioned in adoption of 42 U.S.C. § 2000e-5(h) (the

"attorneys' fees" provision) preclude application of Rule 68 in Title VII cases. However we do not propose to repeat these arguments here. Rather we intend, in filing this brief, to bring to the Court's attention the harmful effects of a strict and mandatory construction of Rule 68 in this case upon prosecution of Title VII class actions. The amici herein will urge the Court, if it is persuaded by the petitioner's arguments as applied to the instant case, expressly to reserve the issue of the applicability of Rule 68 in cases where a plaintiff class action has been sought or certified under Rule 23.

II.

SUMMARY OF ARGUMENT

The class action, allowing efficient consolidation of claims and effective design of class-wide relief, is the frequent and perhaps typical vehicle for

litigation under Title VII of the Civil Rights Act of 1964. Rule 23 of the Federal Rules of Civil Procedure governs the prosecution and settlement of class actions, by which one or more representative plaintiffs may sue on behalf of a class of similarly situated persons. This rule imposes upon each representative plaintiff and upon counsel for the plaintiff unique fiduciary duties properly to represent absent class members. It also imposes special supervisory responsibilities upon the trial court, to ensure absent class members are properly represented. A class representative may not entertain personal interests divergent from those of absent class members. The court must approve any proposed settlement, and be satisfied that class interests have not been sacrificed to divergent interests of the class representatives.

Rule 68 of the Federal Rules of Civil Procedure, at issue here, provides that under certain circumstances where a plaintiff declines to accept an offer of judgment made by a defendant, the defendant's costs must be borne by the plaintiff. Petitioner Delta Air Lines, Inc., has asked the Court to determine Rule 68 is unambiguous and mandatory in its language and must be applied literally in all actions under Title VII.

Amici submit that as to Title VII class actions, the construction and application of Rule 68 sought by petitioner makes the rule incompatible with the requirements of Rule 23, governing these actions. A class representative receiving an order of judgment from a defendant must represent the interests of the class in responding to the offer. The threat of substantial personal liability for her continued zealous prosecution in the face

of the Rule 68 offer creates a conflict of interest in her consideration of the offer. Her own interest in settlement and the class' interest in continued prosecution diverge.

This threat of liability to the class representative creates a conflict of interest for the plaintiff's attorney as well. The attorney has a duty to both the class representative and the class itself. When the interests of the representative and the class are in conflict, the attorney compromises the interest of each in conduct protective of the other.

Finally, literal and mandatory application of Rule 68 to Title VII class action requires the court clerk to enter an accepted judgment, and deprives the trial court of its necessary authority, under Rule 23(e), to supervise the class section settlement process. These conflicts between the requirements of Rules 23 and 68

in Title VII cases are avoided if the Court holds that Rule 68 is inapplicable to actions under Title VII. However if the Court is persuaded by petitioner's arguments that Rule 68 must apply in the instant case, amici submit that the Court should expressly reserve the issue of its applicability to Title VII class actions.[1]

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[1]It is perhaps unfortunate that the first case posed for appellate review in this area involves an individual rather than a class action. For a determination that Rule 68 should not apply to Title VII class actions would suggest, for reasons of policy, that the rule should not be applied to individual claims either. A holding that a plaintiff is freed of the threat inherent in rejecting a Rule 68 offer only if she is a class representative would encourage plaintiffs to assert class actions not otherwise advisable. And, if freedom from a Rule 68 threat only arises upon subsequent class certification, premature efforts at certification also would be encouraged. This would be an unfortunate instance of the "tail wagging the dog."

The Court's purpose, expressed through Rule 68, to discourage litigation of little merit, is largely satisfied in Title VII actions by the Court's holding that defendants prevailing over meritless Title VII claims may be awarded attorneys' fees as

III.

ARGUMENT

If the Court Determines Rule 68 Is Applicable In This Case, the Court Should Expressly Reserve the Issue of Its Applicability to Title VII Class Actions, as Rule 23 In Those Cases Provides Special Grounds For Holding Rule 68 Inapplicable

A. Title VII cases typically are prosecuted as class actions under Federal Rule of Civil Procedure 23, which imposes fiduciary duties upon the class representative and counsel adequately to represent the class, and a special supervisory duty upon the trial court to assure adequacy of any settlement

The class action, governed by Federal Rule of Civil Procedure 23,[2] is a typical

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(footnote continued)

part of costs under the pertinent provisions of the Act. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). On the other hand, the purpose of fair and orderly administration of class actions is only assured by adherence to the standards derived under Rule 23. In these circumstances Rule 23 practice should best not be made subservient to rules adopted after consideration of Rule 68 alone.

[2]The rule generally contemplates the prosecution of class claims through an individual named plaintiff where the common claims of class members will properly be represented by the named plaintiff and may

procedural vehicle for actions arising under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, sex or national origin. Once the rule is invoked, it imposes special responsibilities upon the court, counsel and class representatives.

Employment discrimination based upon race, sex, or national origin is by definition class discrimination, as it is

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(footnote continued)

efficiently be considered by the court. In 1966, the rule was amended to permit the use of a class action where a defendant has acted generally toward the class in a manner calling for equitable relief for the class as a whole. Rule 23(b)(2). The comments of the advisory committee on that provision, observing civil rights cases to be exemplary of its intended use, underscore the special propriety of the 23(b)(2) action for prosecution of Title VII cases. Advisory Committee's Notes to Proposed Amendments to Rule 23, 39 F.R.D. 95, 102 (1966).

directed at a large class of past, present and potential future employees subject to the impermissible classification. Gay v. Waiters' & Diary Lunchmen's Union, 549 F.2d 1330 (9th Cir. 1977); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976); Oatis v. Crown Zellerbach Corporation, 398 F.2d 496 (5th Cir. 1968).

Because Title VII of the Civil Rights Act of 1964 attacks this class-based discrimination, suits under the Act frequently proceed as class actions. East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977). To achieve the Congressional purpose reflected in the Act, it is particularly appropriate that they do so. Alexander v. Aero Lodge No. 735, IAM, 565 F.2d 1364 (6th Cir. 1977); Romasanta v. United Airlines, Inc., 537 F.2d 915, 918 (7th Cir. 1976); Rich v. Martin Marietta Corporation, 522 F.2d 333, 340 (10th Cir. 1975); Gay v. Waiters' & Dairy Lunchmen's

Union, supra. Cf. Advisory Committee's Notes to Proposed Amendments to Rule 23, 39 F.R.D. 95, 102 (1966), supra, n. 2. The experience of the amici confirms the observations of the courts. In order to achieve meaningful remedial relief from discrimination in the job market and workplace, the amici typically seek certification of litigation as class actions under Rule 23.

But as the Court recognized in East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977), a bare allegation of class discrimination does not satisfy the requirements of the rule. If a suit is to proceed as a class action, Rule 23 requires that the class representative can and will fairly and adequately protect the interests of the class. Rule 23(a)(4). Sosna v. Iowa, 419 U.S. 393, 403 (1975).

To assure fair and adequate representation, the rule imposes a fiduciary duty

upon the representative plaintiff to protect interests of the absent class members. She may not abandon this duty where prejudice to absent class members will result. Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978).

A class representative, to fulfill her fiduciary obligations to the class she represents, must vigorously prosecute the claims and tenaciously protect the interests of the class she represents. Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); In re Fine Paper Antitrust Litigation, 82 F.R.D. 143 (E.D. Pa. 1979); Roberts v. Cameron-Brown Co., 72 F.R.D. 483 (S.D. Ga. 1976); rev'd on oth. gds., 556 F.2d 356 (5th Cir. 1977). She must possess the same interest in the litigation as the absent class members. East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977).

The requirement of adequate class representation also imposes a unique

duty upon counsel. Though the class is not the client, the attorney in a class action owes a duty to each class member. Greenfield v. Villager Industries, Inc., 483 F.2d 824 (3d Cir. 1971); Vuyanich v. Republic Nat. Bank of Dallas, 82 F.R.D. 420 (N.D. Tex. 1979). Lack of congruence among interests of class representatives and class members may render even a diligent attorney unable fairly to discharge this duty. Vuyanich v. Republic Nat. Bank of Dallas, supra. Thus where a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow the plaintiff to compromise the class' interest for her own benefit, but must point out the conflicts to the court so the court may protect absent class members. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), reh. den., 581 F.2d 267, cert. den.,

439 U.S. 1115 (1979). These responsibilities apply while the attorney negotiates a settlement. Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832 (9th Cir. 1976).

Finally, the class action imposes special supervisory responsibilities on the trial court. Under Rule 23(e), the trial court must approve any settlement of class claims. Sosna v. Iowa, 419 U.S. 393, 399 n. 8 (1975). The trial court must assure that absent class members are given proper and timely notice of the proposed settlement so that substantial objections to the settlement may be heard. Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832, 835-6 (9th Cir. 1976). Then, having heard relevant arguments the trial court in its discretion may accept or reject a proposed settlement. Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978); Girsh v. Jepson, 521 F.2d 153 (3d

Cir. 1975); Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977); Stull v. Baker, 410 F. Supp. 1326 (S.D.N.Y. 1976); McCray v. Beatty, 64 F.R.D. 107 (D.N.J. 1974).

Thus in a class action, the frequent vehicle for Title VII litigation, court, counsel and the named plaintiff have unique responsibilities to absent class members. The court's responsibility is especially acute in the settlement process.

B. Literal application of the terms of Federal Rule of Civil Procedure 68 to Title VII class actions would create impermissible conflicts of interest and procedural anomalies in the prosecution of these actions, and deprive the trial courts of their authority under Rule 23 to supervise the class action settlement process, and at the same time is unnecessary to discourage frivolous or meritless litigation

Petitioner contends that Rule 68 is clear and mandatory, and must be applied ministerially to Title VII actions. As indicated above, suits under Title VII frequently proceed as class actions. East Texas Motor Freight v. Rodriguez, 431 U.S.

395 (1977). Ministerial application of Rule 68 to these class actions would create conflicts of interest and procedural anomalies in the prosecution and administration of the actions, contrary to the requirements of Rule 23.

First, application of Rule 68 creates a conflict for the representative plaintiff who must discharge her responsibilities to absent class members while the Rule 68 offer threatens her with unknown prospective personal[3] liability for doing so.

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[3]Absent or passive class members generally are not liable for the defendant's costs in the event of an adverse judgment against the class. 2 Newberg, Class Actions §247 (1977). Adoption of a rule allowing the imposition of Rule 68 costs contrary to this principal would create distinct conceptual, constitutional, and administrative problems.

First, an absent class member arguably may not properly be identified as an "adverse party" and therefore may not be assessed for costs under Rule 68. See Lamb v. United Security Life Company, 59 F.R.D. 43, 48 (S.D. Ia. 1973) (absent class members who do not appear specially

The first court to address a Rule 68 claim for costs at the close of a class action has recognized this conflict and rejected the defendant's claim. In Gay v. Waiters' Union, ___ F. Supp. ___, 22 F.E.P. Cases 1249 (N.D. Cal. 1980), notice of appeal

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(footnote continued)

by their own counsel are not parties and therefore are not liable for costs that may be assessed against the representative plaintiff.) But cf. Katz v. Carte Blanche Corporation, 53 F.R.D. 539 (W.D. Pa. 1971) (assuming without discussion the possibility of absent class members being liable for a share of assessed costs), rev'd on other grounds, 496 F.2d 747 (3d Cir. 1974). Further, the means of notifying unidentified class members often employed in class actions and the use of a ten day reply period contemplated by Rule 68 are hardly sufficient devices to afford such notice and opportunity to be heard as due process requires. Finally, if the representative plaintiff were to be held jointly and severally liable with absent class members, there would normally be little incentive for the defendant properly to pursue other class members. Gay v. Waiters' Union, ___ F. Supp. ___, ___ n.3, 22 F.E.P. Cases 1249, 1250 n. 3 (N.D. Cal. 1980), app. pend. sub nom Gay v. St. Francis Hotel, et al., C.A. Nos. 80-4279 and 80-4306 (9th Cir. 1980).

filed sub nom Gay v. St. Francis Hotel, et al., C.A. Nos. 80-4279 and 80-4306 (9th Cir. 1980), the named plaintiffs sought relief under 42 U.S.C. § 1981 from employment discrimination allegedly directed at themselves and the class they represented. The action was certified under Rule 23. An apparently good faith offer of judgment was made by the defendants and rejected by the named plaintiffs prior to trial. At trial the defendants prevailed, and thereafter moved for an award of costs. The court explained the conflict an offer of judgment governed by Rule 68 would impose on a class representative with a fiduciary duty to class members.

> An offer of judgment made to a class representative raises difficulties not present where the offeree acts only on his own behalf. . . .
>
> An offer of judgment forces an individual offeree to weigh his own exposure to liability for an offeror's subsequent costs against his own expected recovery, thereby encouraging a close evaluation of

> the merits of the claim. If the same procedure were imposed in class actions, the representative as offeree would be forced to balance his personal liability for costs against the prospects of sharing with the class in any recovery. His evaluation of the offer would therefore be tinged by self-interest and would tend to differ from that of absent class members. Where the class representative's potential liability for costs is substantial compared to his personal stake in a successful outcome, an inherent conflict of interest is created by the mandatory operation of Rule 68. . . . If operation of Rule 68 were mandatory in circumstances such as these, it would create a strong incentive on the part of the class representative to accept an offer which, had his exposure been fully shared by the entire class, he would have rejected.

___ F. Supp. ___, 22 F.E.P. Cases at 1250 (notes omitted).

The court observed that though under Rule 23(e) the court itself might exercise its authority to protect absent class members, primary responsibility to protect class members still rests with the named plaintiff. "Both the Court and the absent class members must place considerable

reliance on the knowledge, judgment and good faith of the class representative in recommending for or against a settlement offer." Yet the class representative remains subject to the impermissible conflict of interest. Id. at ___, 22 F.E.P. Cases at 1251.

The court concluded that the policies and principles underlying both Rule 23 and the civil rights statutes[4] to which they are applied require rejection of defendant's Rule 68 claim for costs.[5] The defendants have appealed the court's determination.

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[4]Consistent with the lower courts' analysis in the case before this Court, the trial court in Day found the strong Congressional policy favoring relief from employment discrimination would be defeated by threatening the diligent class representative with a penalty for carrying out his responsibility. Id. ___ F. Supp. ___, at ___, 22 F.E.P. Cases 1249, at 1251-1251.

[5]As authority for its final decision the court noted the language of Rule 1, mandating construction of the rules to secure just determination of every action.

The conflict created for the representative plaintiff is felt by plaintiff's counsel as well, with unique consequences for the diligent attorney. She will recognize a substantial liability may fall on the named plaintiff if a more substantial class recovery does not materialize. Faced with the requirements of Rule 68, the attorney, with conflicting responsibilities to the representative and the class, might recommend that the representative accept the offer, yet advise the court that a wholly inadequate settlement threatens the welfare of the class. This casts protection of the class interests into the lap of the court.

But if Rule 68 were deemed controlling the court would be powerless to protect absent class members' interests, notwithstanding its duty under Rule 23(e) to do so. For the language of Rule 68 provides that an accepted offer of judgment shall be

entered by the clerk. It is entered without judicial review. Strict interpretation and application of Rule 68 to Title VII class actions thus is incompatible with governance of those actions under Rule 23.

Recent commentators have recognized the anomalies created by application of Rule 68 in the context of the class action. See Malvern, The "Offer of Judgment" Rule in Employment Discrimination Actions: A Fundamental Incompatability, 10 Golden Gate Univ. L. Rev. 963, 983-996 (September, 1980); Note, Rule 68: A "New Tool for Litigation", 1978 Duke L.J. 889, 903-904. In the former article, the author examines in detail the conflicts created by application of Rule 68 to the Title VII class action. She concludes that the rule's "rigid procedures and mandatory terms are inconsistent with the safeguards for absent

class members mandated by Rule 23 and by due process." Malvern, supra, at 1006.

The latter commentary, Note, Rule 68: A "New" Tool for Litigation, 1978 Duke L.J. 889, touches briefly on the questions which arise if Rule 68 is applied to class actions, among other problems associated with the use of the rule. The author construes Rule 23(e) to authorize the court to order an offer of judgment rejected, notwithstanding the court's ministerial role contemplated by the language of Rule 68. The author thereupon assumes that the language of Rule 68 requires the plaintiff to pay the defendant's costs, even though it was compelled to reject the offer by the court's order. 1978 Duke L.J. at 904. The author concludes Rule 68 should be amended to permit discretion in its application. Id. at 906. Commentators, like the courts below and the court in Gay v. Waiters' Union, supra, recognize the problems

inherent in administration of Rule 68 in Title VII class actions.

Thus the application of Rule 68 to Title VII class action fosters conflicts of interest for the class representatives and plaintiff's counsel. And where Rule 68 offers are accepted by the representative plaintiff, the rule would deprive the court of its ability to properly supervise the settlement process. But even assuming these difficulties are overcome by class representatives who routinely reject Rule 68 offers so as to discharge their fiduciary duty to the class, then Rule 68 serves only to punish a few unfortunate representatives for diligent protection of the interests of the class. It is scarcely a necessary disincentive to baseless or frivolous litigation. This Court's decision in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), permitting the greater judgment for attorneys' fees against

plaintiffs bringing groundless actions serves as a substantial deterrent to these actions. Any frivolous litigant not deterred by threatened liability for attorneys' fees will hardly be moved by the lesser threat of a judgment for costs. The Court's decision in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), renders application of Rule 68 unnecessary to discourage meritless litigation.

C. Application of Rule 68 in Title VII actions has a heightened chilling effect upon exercise of Title VII rights in the context of a Title VII class action

Amici agree with the court below that rigid application of Rule 68 in Title VII cases would prevent the Title VII plaintiff from pursuing vindication of her right to be free of employment discrimination. August v. Delta Air Lines, Inc., 600 F.2d 699 (7th Cir. 1979). The Title VII plaintiff is, after all, impecunious by reason of the very discrimination at issue in the

lawsuit.[6] This is apparent in the case of the individual Title VII claim.

But application of Rule 68 to Title VII class actions would be yet more chilling to the plaintiff's rights. Because the action is typically more complex, costs incurred, especially for discovery, are typically far greater. Consequently the

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[6]The petitioner wrongly contends that "Rule 68 does not, and cannot, chill a meritorious claim; [instead it] provides a monetary incentive to the plaintiff to review the claim realistically in light of the offer." Br. of Pet. 17-18. As Congress recognized in enacting the Civil Rights Attorney's Fees Awards Act of 1976, patterned after Title II and Title VII of the Civil Rights Act of 1964, the citizen who must sue to secure her civil rights frequently has little or no money with which to hire a lawyer. Senate Report No. 94-1011 on passage of Public Law 94-559, rept. in 1976 U.S. Code Cong. and Admin. News 5908, 5910. The plaintiff who can not retain an attorney can scarcely bear a risk of an unknown future liability, here claimed to be $10,000, should her claim unexpectedly fail. The petitioner's implicit assumption that a plaintiff with a reasonable and substantial claim has risk capital sufficient to avoid intimidation cannot survive close scrutiny.

risk of liability to the representative plaintiff who rejects a Rule 68 offer would be greater. Yet the plaintiff can take little comfort from an optimistic assessment of the strength of the case. For this Court's cogent observation in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), relates the experience of even the most sophisticated Title VII counsel.

> [S]eldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation.

Id., 434 U.S. at 422. Knowing this truth the attorney for a representative plaintiff and for the class must explain to the client that though her case appears strong and the class claims substantial, she may

lose, and suffer loss beyond her ability to bear. Only a rare plaintiff could fail to be discouraged in the face of that threat.

Occasionally public interest law firms and foundations[7] such as amici underwrite the costs of class litigation. But these foundations have limited resources. They too understand the unpredictability of complex Title VII litigation. Further, these foundations can provide little direction to the progress of the lawsuit. They may underwrite the costs, but a volunteer attorney typically prosecutes the suit itself. The attorney's duties run

[7] The occasional involvement of these foundations in these actions provides additional reason to hold Rule 68 inapplicable to these cases. In In re Primus, 436 U.S. 412 (1978), the Court recognized the First Amendment interest of the sponsoring foundation in litigation intended to inform the public and redress social wrongs. Mechanistic application of Rule 68 to actions sponsored for these purposes inhibits these organizations from exercise of their constitutional rights, just as it inhibits the plaintiff from vindication of her rights under the Civil Rights Act.

directly to the named plaintiff and the class she represents. The foundations have neither the resources to oversee the litigation, nor the right to interfere with the attorney-client relationship. If Rule 68 were applicable to these cases, the foundations' potential liability would be virtually unlimited. The foundations, particularly smaller ones unable to spread risk over a large litigation program, will have to act as timidly as the impecunious plaintiff, fearful of a devastating award of costs.

IV.

CONCLUSION

As we have indicated above, amici concur with the respondent and with amicus Lawyers' Committee for Civil Rights Under Law that Rule 68 generally should not be applied in Title VII cases. However, if

the Court is persuaded that Rule 68 at least may be applied in this case, amici respectfully urge the Court to expressly reserve the issue of the rule's applicability to Title VII class actions. Amici submit that application of the rule in these class actions would be both inimical to the important civil rights of the affected class, and disruptive of the court's supervision of the actions.

Respectfully submitted,

MARY ELLEN HUDGINS
Attorney for Amici

QUESTIONS PRESENTED

1. Is a purported offer of judgment, which is plainly not calculated to encourage settlement, a valid offer pursuant to Rule 68.

2. Does Rule 68, which requires the offeree to obtain a judgment, apply in cases where the Plaintiff does not prevail.

3. Does Rule 68 divest the District Court of its discretion to award costs in a Title VII case where the statute provides that District Courts "may" award costs to the prevailing party.

4. By failing to raise the issue in the Court of Appeals, did Delta waive its right to request this Court to reverse the Order of the lower courts which denied Delta its costs under Rule 54(d).

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Cases

In the
Supreme Court of the United States

October Term, 1979

No. 79-814

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT ROSEMARY AUGUST

STATEMENT OF THE CASE

Respondent, Rosemary August ("Ms. August") was employed as a flight attendant by Delta Air Lines, Inc. ("Delta") on November 22, 1971; on August 27, 1975 she was discharged (Jt. App. p. 27). Ms. August appropriately pursued her administrative remedies and upon receipt of a notice of right to sue from the United States Equal Employment Opportunity Commission ("EEOC"), she filed a lawsuit in federal court on January 4, 1977, pursuant to Title VII of the 1964 Civil Rights Act, as amended ("Title VII"). Ms. August requested the relief accorded a prevailing party by Title VII: reinstatement,

back pay, benefits, other equitable relief, and costs, including attorney's fees (Jt. App. pp. 2-3, 19-20).

On May 12, 1977, Delta tendered to Ms. August a purported offer of judgment in the amount of $450 (Jt. App. pp. 33-34). She declined to accept the purported offer. Trial began September 22, 1977, and lasted 2½ days. The District Court entered its order in June of 1978 dismissing Ms. August's complaint with prejudice and ordered each party to bear their own costs. In so doing the District Court observed that:

> Standing unrebutted, this [Ms. August's] evidence would raise the necessary inference of racial bias. However, the evidence establishes that in equal numbers of cases, it was the Negro that benefited from a benevolent supervisor (Jt. App. pp. 31-32).

Delta subsequently presented a motion pursuant to Rule 68 of the Federal Rules of Civil Procedure seeking that Ms. August be ordered to pay Delta's costs incurred during the pendency of the lawsuit from May 12, 1977, until the date of its motion. The District Court denied Delta's motion noting that Ms. August's lawsuit was not wholly specious (Jt. App. p. 12).

Delta appealed the denial of its Rule 68 motion. A unanimous Court of Appeals for the Seventh Circuit affirmed the District Court's denial of Delta's motion and in so doing observed that Delta's offer of $450 "... is not of such significance in the context of this case to justify consideration by the plaintiff (Jt. App. p. 5). Delta petitioned for a rehearing *en banc*, this request was denied without dissent (Jt. App. p. 1).

At no time did Delta raise the issue of whether there had been an abuse of discretion by the District Court in its order which provided that each party would bear its own costs of litigation pursuant to Rule 54(d).

SUMMARY OF ARGUMENT

The language of Rule 68 is not so clear as to admit of no other interpretation than one which requires the mechanical shifting of costs whenever the final judgment obtained by plaintiff is not more favorable than the defendant's offer. Delta seeks to bolster its position by unwarranted assertions that its construction comports with the history of the Rule and is consonant with the other provisions of the Federal Rules governing the assessment of costs. In rejecting Delta's theory the courts below correctly perceived that the mechanical implementation of the Rule urged by Delta only would serve to permit defendants to secure "cheap insurance against costs" and in no way would further the Rule's purpose of encouraging settlements. Accordingly, the lower courts agreed with Ms. August that in order to trigger the shifting of liability for costs of Rule 68, Delta's offer had to be reasonably calculated to lead to settlement.

As set forth in this brief, the rulings of the lower courts should be affirmed by this Court. Rule 68 has a single purpose: to encourage parties to settle cases before trial. This case graphically illustrates that the only way Rule 68 can operate properly is if an offer is reasonable. If not, the plaintiff obviously has no incentive to settle and the Rule is thus recast as a coercive tool for the defendant. As the lower courts found in this case, there can be no legitimate claim that Delta's offer was calculated to encourage settlement. Simply contrasting the $450 offer with the $20,000 actual damages incurred by Ms. August by the time Senior District Court Judge Julius J. Hoffman rendered his opinion belies Delta's claim that its offer was intended to foster settlement. To the contrary, the gross disparity cited above suggests that

the sole motivation underlying the offer was to insulate Delta from bearing its costs if it ultimately prevailed.

As is evident, Delta's construction, if adopted by this Court, would effectively transform Rule 68 from a tool to spur settlement into a means by which sophisticated defendants could shield themselves from bearing their own costs. That construction not only fails to achieve the purpose of the Rule, but acts to discourage settlement since the defendant can incur costs with impunity. It should be rejected by this Court.

There is a second, perhaps more fundamental, reason why Delta's attempt to stretch the language of Rule 68 to require Ms. August to bear its costs in this case must fail. Delta asks this Court to construe literally the word "must" in Rule 68 to require the mechanical shifting of liability for defendant's costs in every instance where a judgment is less favorable to the plaintiff than the defendant's offer. But in so arguing, Delta studiously avoids discussion of the context in which the word "must" appears. The sentence *in its entirety* provides that "[I]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." As the sentence clearly states, to invoke the Rule and to shift the liability for defendant's costs, the plaintiff has to obtain a judgment. Rule 68 simply has no bearing where, as here, the *defendant* prevails.

The history of Rule 68 reinforces this construction of the sentence as a whole and confirms that the Rule is designed to cover situations in which the plaintiff ultimately prevails, but wins less than the amount offered by defendant. The Advisory Committee Notes, the case law

developed pursuant to the state statutes which served as models for Rule 68, and the other state statutes which were forerunners of the Rule, uniformly indicate that the Rule is directed *only* against prevailing plaintiffs. Limiting the implementation of the Rule in the more modern federal context to instances where plaintiffs prevail also complements the structure of the Federal Rules. Rule 54 (d), the general cost provision, applies to cases where the defendant prevails. Rule 68 was promulgated to fill a gap in the Rules by affording a basis for assessing costs against a prevailing plaintiff. Delta's mechanical construction employing Rule 68 as a mace which operates automatically, not only conflicts with the plain language of the Rule, but is at odds with the Rule's history and the overall scheme of the Federal Rules. Accordingly, Delta's theory should be rejected by this Court.

One further consideration militates against Delta's argument. This is a Title VII lawsuit. As this Court has frequently recognized, Congress intended to "cast a [civil rights] plaintiff in the role of 'a "private attorney general," vindicating a policy that Congress considered of the highest priority, . . .'" *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416 (1978), *quoting Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). In light of the special role Congress has entrusted to Title VII plaintiffs, this Court has been particularly vigilant in safeguarding their access to the courts. E.g., *Alexander* v. *Gardner-Denver*, 415 U.S. 36 (1974). Delta's interpretation of Rule 68, if adopted by this Court, will inevitably erode Title VII guarantees by chilling the victims of discrimination in going to court. Potential plaintiffs understandably will fear that if they go to court and lose, they will be saddled with the enormous costs that are incurred in

Title VII litigation by defendants, let alone their own costs if they lose. Here, in a case involving an individual claim, Delta ran up what Ms. August estimates to be at least $10,000 in costs.[1] That amount alone is enough to discourage the typical Title VII plaintiff, who is often unemployed, from vindicating his or her rights in court. Delta's construction of Rule 68 flies in the face of the strong policies underlying Title VII. It should be rejected by this Court.

Delta's argument that Rule 68 should apply in Title VII actions is also in conflict with Title VII's attorney's fee provision. The pertinent portion of 42 U.S.C. §200e-5(k) provides that "[I]n any action or proceeding under . . . [Title VII] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . .". In this instance Congress has specifically provided for the retention of discretion by the district courts for the purpose of assessing costs. Yet Delta argues that its purported offer of judgment divested the District Court of its discretion and required the court to mechanically grant Delta's motion for costs. In instances where Congress by statute has expressly determined the standards for awarding fees, Delta's argument should be rejected. Courts should not impose the Federal Rules in a manner which alters or abrogates statutory provisions. *See* 28 U.S.C. §2072.

[1] This figure is based on approximately $6,000 in costs incurred by Ms. August at trial, recognizing Ms. August's second copy of Delta's "same day" and "next day" order of Transcript and Delta's $2,300 in costs on appeal.

ARGUMENT

I.

THE DECISIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT WHICH HELD THAT THE APPLICATION OF RULE 68 IS NOT MECHANICAL ARE CORRECT.

Delta's principle argument is that the plain language of Rule 68 is so clear that it compels the conclusion that Rule 68 requires the shifting of the costs of litigation in every case where a plaintiff fails to win more than the amount tendered by way of a purported offer from a defendant. This point is reiterated frequently throughout Delta's brief; but repetition does not make it so. On the contrary, this case illustrates that the cost-shifting provisions of the Rule are not triggered unless and until a defendant has tendered an offer reasonably calculated to encourage settlement.

At the outset, it is useful to briefly canvass the relevant facts. At the time of her discharge Ms. August had been employed by Delta for almost four years (Jt. App. p. 27). Ms. August's employment record was not substantially dissimilar from that of many of her co-workers. Nonetheless, during her employ with Delta she was singled out in a variety of ways. She was required to have a medical examination for venereal disease, she was suspended for seven days for serving a tepid cup of coffee despite the conclusion by her supervisor that the complaint was unjustified and her supervisor noted in a file review that she "should be watched."

When Ms. August was fired in August 1975, she believed that the underlying cause was race discrimination. Accordingly, without the assistance of an attorney, Ms. August filed charges with the EEOC. Following a lengthy investigation, the EEOC determined that Ms. August had "reasonable cause to believe" her allegations against Delta were true, and the EEOC issued a right-to-sue letter to her.

In January 1977, Ms. August commenced this lawsuit against Delta alleging that she had been discriminated against on the basis of her race. In her complaint she sought actual damages amounting to approximately $20,000, reinstatement, benefits, other equitable relief and costs, including attorney's fees. On May 12, 1977, after only the most preliminary discovery was completed, Delta purportedly offered Ms. August $450 in full settlement of the case. She declined to accept the offer.

Following a bench trial of 25 days, the District Court determined that although Ms. August had presented evidence which unrebutted would have been sufficient to raise the inference of racial bias, she had failed to carry the burden of proving the requisite discrimination in accordance with *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Accordingly, the complaint was dismissed and the District Court ordered both parties to bear their own costs.

Delta subsequently sought to recover its costs of litigation incurred following the date it tendered its purported offer of judgment to Ms. August. The District Court denied Delta's motion for costs pursuant to Rule 68 finding that in light of the extent of Ms. August's damages, which at the time of the District Court's ruling were approximately $20,000 in back pay alone, and in light

of the strength of her case on the merits, $450 "did not constitute an effective offer" and was "not at least arguably reasonable" (Jt. App. pp. 11, 12). The Court of Appeals affirmed the District Court's decision to deny Delta its costs pursuant to Rule 68, noting that Delta's purported offer did not ". . . justify serious consideration by the plaintiff" (Jt. App. p. 5).

Thus, the four judges to examine all the relevant factors in this case—the strength of Ms. August's case on the merits, Delta's defense, the extent of Ms. August's damages, and the timing and substance of Delta's alleged offer—have unequivocably stated that Delta's purported offer was not reasonably calculated to encourage settlement and, therefore, did not trigger the Rule.

Implicitly conceding that its offer was not intended to promote settlement, Delta rests on the contention that Rule 68 does not require defendants to act reasonably. According to Delta, all that is required to trigger the Rule is formal adherence to the procedures specifically set forth in the Rule. Delta even contends that an offer of $10.00 would be sufficient, provided the defendant complies with the mechanical terms of the Rule (Jt. App. p. 5). In espousing this theory Delta recognizes that as a practical matter the Rule, as it construes it, is little more than a haven for defendants who seek to shield themselves from the burden of paying their own costs.

It is beyond dispute that the purpose of Rule 68 is to promote settlement and to avoid protracted litigation. 7 Moore's Federal Practice, Second Edition, ¶68.02, *quoting* the 1946 Advisory Committee's Note to Amended Rule 68. Delta's mechanical theory serves no such purpose. There is no more basic principle of construction than the one Delta seeks to avoid, *i.e.*, a statute or rule must be construed to effectuate its purpose. Here, as both lower courts prop-

erly recognized, the only way to construe Rule 68 in accord with its objectives is to find that purported offers, which in light of the facts surrounding the particular case are not objectively calculated to induce settlement, do not trigger the Rule. As one commentator noted, the only way the Rule makes sense is if it assures that the defendant will act reasonably. Note, *Rule 68: The "New" Tool for Litigation*, August, 1978 Duke L.J. 889, 893-895. Not only is this construction fully consonant with the purpose of the Rule, but it serves the goals enunciated in Rule 1, Fed. R. Civ. P.

> They [the Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 68 as applied by the lower courts in this case will force parties to assess their chances at trial realistically. Once a reasonable offer is tendered, a plaintiff will be confronted with the question Rule 68 is designed to force: whether the exposure to liability for the opponent's costs outweighs his or her own expected recovery.

In making an offer that will trigger the Rule the defendant must perform the same intricate calculus plaintiff must perform in attempting to apprehend the likelihood of success on the merits. While Rule 68 is intended to tip the balance in favor of settlement, it in no way is intended to be the mace Delta envisions.

The case law supports Ms. August's position. In *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500 (N.D. Cal. 1980), the court rejected the defendant's contention that Rule 68 precluded examination of the facts surrounding the litigation in determining whether a purported offer of judgment was effective. The court determined that in light of the fact that the case had been certified a class action and involved several novel

issues, an offer of judgment directed to the named plaintiffs would not prevent the court from denying costs. This case follows the great weight of case law on the issue. In *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661 (E.D. La. 1976), the court spoke of Rule 68 as a "procedure whereby a defendant may offer what is really due, and put the burden of costs on the plaintiff . . . to prevent a plaintiff from forcing a defendant to pay costs by making an exorbitant demand." 429 F. Supp. at 666. Earlier, in *Honea v. Crescent Ford Truck Sales*, 394 F. Supp. 261 (E.D. La. 1975), the same court said that Rule 68 was triggered "if a reasonable offer is spurned" and that "[d]efendants should be encouraged to respond to a well founded claim with a reasonable offer." 429 F. Supp. at 262, 263. *See also, Rondo v. Lane*, 10 Ohio St. 2d 259, 227 N.E. 2d 197 (1967).

In the most thoughtful of those cases to apply Rule 68, *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 697 (E.D.N.Y. 1974), the court held that "a preliminary finding is required that an appropriate offer of judgment has been made," and it concluded that because the offer "afforded the plaintiff substantially the relief prayed for in its complaint", it was a "proper offer". 63 F.R.D. at 699. It was reasonable.

Were Delta to have offered Ms. August $456 and reinstatement, a remedy analogous to a promise to desist from infringing on a patent or copyright as in *Mr. Hanger*, it might have been able to convince the District Court that its offer was reasonable. As the District Court noted below:

> [W]hile the court did ultimately find itself constrained to enter its judgment for the defendant, the court certainly did not find the plaintiff's claim to be wholly specious. In the opinion of this court, and in

> the particular facts and circumstances of this case, an offer of only the sum of $450 could only have been effective were the plaintiff's claim totally 'acking in merit or were there additional factors which would mitigate in favor of defendant. (Jt. App. p. 12).

It is obvious that the relevant context for determining the reasonableness of an offer of judgment sought to be implemented against plaintiff is the point in time at which the offer is made, not at the time of determination on the merits. Once the plaintiff has lost, *any* offer looks good by comparison. As Mr. Justice Stewart noted in *Christiansburg Garment Co.* v. *EEOC*, 314 U.S. 412 (1978):

> . . . it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. 314 U.S. at 422.

The question is, did Delta's offer serve the purpose of Rule 68 on May 12, 1977, or was it merely an attempted manipulation of the Rule for a far less noble purpose? As the Court of Appeals observed, the purported Rule 68 offer of judgment ". . . is not of such significance in the context of this case to justify serious consideration by this plaintiff" (Jt. App. p. 5).[2]

[2] Every court except one to consider Rule 68 has specifically discussed the reasonable nature of the purported offer prior to determining whether or not its implementation is warranted. In *Dual* v. *Cleland*, 79 F.R.D. 696 (D.D.C. 1978), the reasonable nature of the offer was not addressed by the Court. The key to resolving disputes in litigation is compelling both parties to assess their case before trial realistically. This will be accomplished only where a defendant's offer is reasonable.

Delta suggests its purported offer tendered to Ms. August was based on the fact that Delta knew it had not discriminated against her, and Delta argues the purported offer was more than reasonable because it was more than Ms. August deserved when measured against the outcome of the case.[3] Delta did prevail. But as this Court knows and most courts recognize, the outcome of litigation is the result of many different factors.

Defendants do not prevail just because they are right, and plaintiffs do not lose just because they are wrong. The result of any lawsuit hinges on a number of factors which include, but are not limited to: witnesses may fail to appear because they do not wish to cooperate, subpoenas were not served, or they were unavailable for reasons beyond their control; counsel may not be sufficiently skilled or prepared; discovery may have been incomplete; witnesses may be nervous and present themselves poorly; witnesses may not tell the truth; records may be destroyed or missing; counsel may make incorrect strategic decisions; the trier of fact may not ascertain the proper issues or understand the particular law(s) in question. As this Court has observed recently, ". . . seldom can a prospective plaintiff be sure of ultimate success." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422 (1978). Certainly this case was not entirely unfounded. Both the District Court and the Court of Appeals recognized that this lawsuit was not specious or frivolous (Jt. App. pp. 12, 18, 31). But rather as the District Court observed, Ms. August at least had presented a *prima facie* case (Jt. App. p. 31). Viewed in this light, Delta's claim that its offer was reasonable is simply untenable.

[3] It is of interest to note that Delta has made precisely the same purported offer of judgment in the amount of $450 in a subsequent Title VII case.

II

BY ITS TERMS RULE 68 ONLY APPLIES TO PLAINTIFFS WHO PREVAIL

Rule 68 provides that "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." (Jt. App. p. 36). Delta's insistence upon a restrictive reading of certain words contained in Rule 68 is an attempt to avoid the logical, historical and proper application of the Rule. Hiding behind dictionary definitions only obscures the real question of how to effectuate the purpose of the Rule. Rule 68 is explicit. It operates where a plaintiff obtains a judgment. Ms. Angust did not obtain a judgment. As one commentator observed, "[I]t seems implicit in the language of the rule that the plaintiff must prevail." Note, *Rule 68: The "New" Tool for Litigation*, Angust, 1978 Duke L.J. 889, 890.

Indeed, the meaning of Rule 68 can be construed properly only when viewed in the complete context of its history, the application of its state forerunners, and its function in conjunction with the other Federal Rules.

> But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory history no matter how "clear the words may appear on 'superficial examination.'" *United States v. American Trucking Assns.*, 310 U.S. 534, 543-44. *See also United States v. Dickerson*, 310 U.S. 554, 562; *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943).

As this Court also has noted:

> But that rule [the so-called "plain meaning" rule] has not dominated our decisions. The contrary doctrine [examination of legislative history] has prevailed. *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 444 (1955).

An analysis of the substantive history of Rule 68 precludes the application of the Rule as Delta urges.

As Delta has indicated in its brief, the Advisory Committee Notes at the time of the creation of the concept of offer of judgment in federal law in 1938 referred to three state statutes: Minnesota, Montana and New York (Pet. Br. p. 8), 12 *Wright and Miller, Federal Practice and Procedure* §3001 (Rev. Ed. 1973). These statutes are similar in language to Rule 68. 2 Minn. Stat. (Mason, 1927) 9323; 4 Mont. Rev. Codes Ann. (1935) 9779; N.Y.C.P.A. (1937) 177. Under these statutes, the case law indicates that there has never been a single reported instance where these statutes have been applied to impose the payment of a defendant's costs on a plaintiff where the plaintiff had not prevailed as a result of the litigation. Indeed, on each occasion where these "Rule 68" forerunners were utilized to assess costs at the conclusion of a lawsuit, the plaintiff had prevailed but had been less successful in the judgment obtained than the offer previously made by defendant.[4]

In no case cited under any of these three statutes is there any indication that an unsuccessful claimant falls within

[4] *See Watkins v. W. T. Nesler Co.*, 135 Minn. 343, 160 N.W. 864 (1917) (plaintiff obtained $31.25 and costs; defendant offered $31.25 and costs); *Woolsey v. O'Brien*, 23 Minn. 71, 72 (1876) (plaintiff obtained something less than defendant offered); *Petrosky v. Finnegan*, 38 Minn. 26, 35 N.W. 665 (1887) (plaintiff obtained $50; defendant offered $50); *Morris-Turner Livestock Co. v. Director General of Railroads*, 266 F.2d 600 (D. Mont. 1920) (plaintiff obtained something less than defendant offered); *Smith v. New York, O. & W.R.R. Co.*, 119 Misc. 506, 196 N.Y.S. 521 (1922) (plaintiff obtained something less than the $436.40 offered by defendant).

the passage of the new federal rule. The conclusion must be that the Advisory Committee drafted a rule similar in [illegible] to the statutes which had operated successfully [illegible] and the Committee expected the new rule to be interpreted and applied in the same manner in which its predecessors had been [illegible].

Delta acknowledged in its brief before this Court that the statutes cited by the Advisory Committee were not the only statutes existing prior to the adoption of Rule 68 in 1938. [illegible] state statutes [illegible] to support the proposition that [illegible] discretion [illegible] imposition of costs was applied under [illegible]. It is undisputed that the statutory [illegible] mechanisms of these additional statutes are the same as [illegible] similar to Rule 68.

[illegible] the plaintiff prevailed in these cases [illegible] was rendered against the prior offer. [illegible] the court declared the plaintiff [illegible] in accordance with the common law rule of [illegible] automatically [illegible] the losing party to pay the prevailing party's costs.

[illegible] any statute similar to Rule 68 in [illegible] prior to the adoption of Rule 68 [illegible] plaintiff [illegible] must have been a prevailing [illegible] was implemented.

[illegible]

(footnote continued)

The Honorable Robert G. Dodge, a member of the Supreme Court Advisory Committee and one of the original framers of the Rule, when speaking at the Institute on the Federal Rules, stated that Rule 68:

> . . . affords a means for stopping the running of costs where the defendant admits that part of the claim is good but proposes to contest the balance. He may then make an offer of judgment of the amount which he considers is due and unless the plaintiff recovers more than that, the plaintiff gets no costs accruing after that offer of judgment. Proceedings of the Institute of Federal Rules, p. 337.

Dodge understood Rule 68, as the previously enacted state statutes had been applied, as a mechanism designed (1) to protect a prevailing plaintiff, who could have accepted an appropriate offer, from recovering what ultimately has been determined to be costs spent in support of a demand that exceeded a reasonable recovery, and (2) to enable a defendant to recover the costs it incurred subsequent to the making of an appropriate offer.

(footnote continued)

[illegible] plus interest, the total of which exceeded $147.81); *Fowler v. [illegible]*, 26 Ind. [illegible] (1866) (plaintiff obtained $15, defendant offered $15); *Hurst v. Springfield Fire and Marine Insurance Co.*, 105 Kan. 313, 183 P. 17 (1919) (plaintiff obtained $1052.50, defendant offered $1053); *Wachsmuth v. Orient Insurance Company*, 49 Neb. 590, 68 N.W. 935 (1896) (plaintiff obtained $295.16, defendant offered $150); *Herring-Hall-Marvin Safe Co. v. Balliet*, 31 Ore. 91, 156 P. 176 (1916) (plaintiff obtained $374.50, defendant offered $400); *Hammond v. Northern Pacific Rail Company*, 23 Ore. 157, 31 P. 299 (1892) (plaintiff obtained $1998.05, defendant offered $1998.95); *Sioux Falls Adjustment Co. v. Penn Soo Oil Co.*, 53 S.D. 77, 220 N.W. 146 (1928) (plaintiff obtained less than offer; defendant offered $561.81); *Newton v. Allis*, 16 Wis. 197 (1862) (plaintiff obtained $266 plus $50, defendant offered $250 plus $50 per year).

Dodge's interpretation of Rule 68 is further endorsed by another commentator, Walter P. Armstrong, who approved of the following proposed amendment to Rule 68 to clarify any ambiguity in the original Rule:

> . . . no costs shall be recoverable by the offeree which were incurred after the making of an offer equal to or greater than the judgment finally obtained by the offeree, and that he should pay costs from the time of the offer. 4 F.R.D. 124, 126 (1944).

The analyses of Armstrong and Dodge make sense only when Rule 68 is understood as applicable to plaintiffs who spurn an offer of judgment, who go on to prevail at trial, but who are not more successful at the conclusion of the litigation than they would have been had they accepted the offer and as a result had been considered the prevailing offer and as a result had been considered the prevailing party entitled to recover all costs of litigation but for a rule to the contrary.

Rule 54(d) presently provides that the court has discretion to award costs to the prevailing party:

> . . . costs shall be allowed as of course to the prevailing party unless the court directs otherwise. . . . Fed.R.Civ. Pro. 54(d).

Delta feigns concern in its brief for the integrity of the Federal Rules of Civil Procedure as a cohesive unit. Yet the result Delta seeks would be destructive to the complementary nature of Rules 54(d) and 68. The Rules are meant to work together: Rule 54(d) setting forth the general rule as to the costs and prevailing parties (the modern replacement of the common law rule that unsuccessful parties pay opponent's costs), deferring to Rule 68 under certain circumstances.

Prior to the adoption of the Federal Rules, costs incurred by a prevailing party were uniformly paid by the unsuccessful opponent. Note, *Costs in Common Law Ac-*

tions, [illegible] Colum. L. Rev. [illegible] (19[illegible]). The modern replacement of this common law rule, Fed. R. Civ. Pro. 54(d), provides that the recovery of costs by the prevailing party is subject to the discretion of the District Court. Rule 68 was designed complementarily with Rule 54(d) to discourage litigation by plaintiffs who are assured of prevailing to some extent and who attempt to recover more than they can obtain in the knowledge that they virtually are guaranteed recovering their costs of litigation. Its application in conjunction with the other Federal Rules would relieve a defendant of the burden of paying plaintiff's costs when plaintiff unreasonably rejects an offer of settlement. The discretion of the court afforded by Rule 54(d) with respect to totally unsuccessful plaintiffs and totally successful defendants would be left intact.

III

DELTA'S MECHANICAL THEORY OF RULE 68 CLASHES WITH THE POLICIES UNDERLYING TITLE VII, AND IT DOES NOT CONFORM TO THE SPECIFIC LANGUAGE OF TITLE VII'S COST PROVISION

Delta's argument conspicuously glosses over the fact that this is a Title VII lawsuit. In so doing, Delta seeks to avoid acknowledging that Rule 68 does not govern the assessment of costs in this case, but rather that 42 U.S.C. §2000e-5(k), which allows a prevailing party in Title VII actions to recover costs, including attorney's fees, from the losing party, determines the award of costs here. Title VII provides:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. §2000e-5(k).

The statutory language could hardly be more explicit. Nowhere does the statute speak in mechanical terms. To the contrary, this Court indicated in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 that ". . . the permissive and discretionary language of the statute does not even invite, let alone require . . . a mechanical construction."

This Court has been responsive to Congressional concern in this area recently observing that assessments against plaintiffs ". . . simply because they do not finally prevail would substantially add to the risks inherent in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422 (1978).

The wisdom of Congress' decision to provide this discretion for awards of costs and attorney's fees is evident in Ms. August's case. Following her discharge, Ms. August, not unlike other such plaintiffs, was unable to obtain similar employment. At best she found intermittent jobs as a sales person. At the time of trial she was unemployed. Ms. August had lost her health benefits which were significant to her because of a chronic illness. She also had lost a number of other benefits which either she could not afford or it was impossible to replace. Her only hope to recoup her financial losses and remove the tarnish on her employment record, was to bring a Title VII lawsuit to win back what she felt had been unjustly denied her. She tried, and she lost. She did not win anything and ultimately had to bear her own substantial costs of litigation. Nowhere in the opinion of either lower court was there a suggestion that Ms. August had brought or pursued her case in bad faith. No judge determined that her case was frivolous, vexatious, or groundless.

To saddle this plaintiff with the extensive costs that Delta ran up as its costs after May 12, 1977, inevitably would undermine Title VII goals. If unsuccessful Title VII plaintiffs were routinely forced to bear a defendant's costs in addition to their own, and indeed the vast majority would be, given Delta's mechanical insurance program, few allegedly aggrieved parties would be in the position to advance the public interest espoused by Congress in Title VII by bringing lawsuits to vindicate public policy observed in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). In this case the District Court noted that Ms. August's evidence unrebutted would have been sufficient to support her claim, and the Court of Appeals supported the lower court opinion. She is therefore within the class of persons Title VII was intended to protect and to encourage to seek redress in the courts.

In *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), this Court repeatedly emphasized that the decision of whether to tax costs and attorney's fees was within the discretion of the district court, terming the statutory language "permissive and discretionary". 434 U.S. at 418. The Court noted that its conclusion was consistent with the overall purpose of the provision, which was enacted to encourage individuals allegedly injured by racial discrimination to seek judicial relief. *Id.; see also Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 401-402 (1968); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975). While the Court recognized that the costs and fee provision also served the function of discouraging groundless suits, it cautioned that "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, groundless, or that the plaintiff continued to litigate after

it clearly became so." *Christiansburg*, *supra*, 434 U.S. at 422. This case is a Title VII lawsuit. Its statutory provision concerning costs must govern and Rule 68 should not be construed to cut back on Congress' specific direction to the lower courts to exercise their discretion in these matters carefully to best effectuate the goal of the statute. See, 28 U.S.C. §2072. In denying Delta its costs, the courts below applied the standard set down in *Christiansburg* and ruled that since the plaintiff had made out at least a colorable claim on the merits, each side would bear its own costs.

The decisions of the lower courts are plainly in keeping with the objectives of Title VII and 42 U.S.C. §2000e-5(k) and should not be disturbed by this Court.

IV.

THIS COURT NEED NOT ADDRESS DELTA'S UNSUPPORTABLE CONTENTION THAT THE DISTRICT COURT ABUSED ITS DISCRETION UNDER RULE 54(d).

Evidently recognizing the flaws in its Rule 68 argument, Delta falls back to argue that even if the lower courts properly construed the application of Rule 68, this Court should substitute its judgment for that of the District Court with respect to the question of whether Delta was entitled to its costs pursuant to Rule 54(d). Delta's contention is wrong for three reasons. First, Delta did not raise this argument before the Court of Appeals. The question is not jurisdictional in nature. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Dugan* v. *United States*, 274 U.S. 195, 200 (1927); *United States* v. *Mendenhall*, No. 78-1821 (May 27, 1980).

Second, even if this question were properly before this Court, Delta's contention is unsupported. The broad latitude afforded district courts in the taxation of costs has long been recognized by this Court. *E.g.*, *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227 (1964).

Third, Title VII plaintiffs are entitled to special protection with respect to the assessment of litigation costs. This Court has characterized the Title VII plaintiff as the chosen instrument of Congress to vindicate "a policy that Congress considered of the highest priority". *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978), *quoting Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). In denying Delta its costs at the close of the case, the District Court determined that had the evidence Ms. August presented in her Title VII case gone unrebutted, it would have raised the necessary inference of racial bias for her to prevail. When the District Court addressed Delta's subsequent motion for costs pursuant to Rule 68, it reiterated that its decision on the merits with respect to costs was premised on the fact that this was not a wholly specious case and that it was a civil rights case (Jt. App. p. 12).

None of these findings are erroneous, let alone clearly so, nor do they constitute an abuse of the District Court's discretion. Therefore, the decision of the District Court denying Delta's costs should be affirmed.*

*A number of the Amici in this case have indicated that they intend to file briefs advancing the argument that Delta's purported offer failed for technical reasons, noting that Delta's offer could not have included attorney's fees required as an award of costs by Title VII. As this argument will be presented in detail by Amici, Ms. August will not address this issue.

CONCLUSION

As set forth above, the mechanical construction of Rule 68 urged by Delta would not encourage settlement; rather it would have the opposite result of prolonging litigation by providing defendants "cheap insurance against costs". Moreover, both the language and the history of the Rule strongly support Ms. August's contention that the implementation of the Rule in this case is inappropriate because the Rule operates only in instances where a plaintiff has obtained something by way of judgment, albeit less than the amount offered by defendant. Since her case was dismissed and Ms. August did not obtain any relief, Rule 68 is inappropriate.

Delta has responded to Ms. August's position stating that the precise words of the Rule are so clear that the Court may not stray from Delta's mechanical interpretation. Thirty-five years ago in *Cabell* v. *Markham*, 142 F.2d 737, 739 (2d Cir.), *aff'd*, 327 U.S. 404 (1945), Judge Learned Hand addressed a similar argument. His observations were as timely today as they were then:

> The defendants have no answer except to say that we are not free to depart from the literal meaning of the words, however transparent may be the resulting stultification of the scheme or plan as a whole.
>
> Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute. . . . As Holmes, J., said in a much-quoted passage from *Johnson* v. *United States*, 163 F. 30, 32, 18 L.R.A., N.S., 1194: 'it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.' Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most

> reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. (Citations omitted).

Thus, it is clear that Delta's mechanical interpretation would undermine the purpose of Rule 68. The allegedly clear language of the Rule does not compel the results urged by Delta. The purpose of the Rule requires that Delta's perspective be rejected.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed and the costs of all appeals taxed against Delta.

Respectfully submitted,

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September 1980

QUESTION PRESENTED

Whether a token offer by a defendant, which the district court found to be not even arguably reasonable, serves, by virtue of Rule 68, to take away from the district court the discretion conferred by Rule 54(d) to decline to award costs against an unsuccessful plaintiff who in good faith had sought to vindicate an important civil right.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-814

DELTA AIR LINES, INC.,
Petitioner,

v.

ROSEMARY AUGUST.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee has over the past fifteen years enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor.

The question at issue here is whether a token offer by an employer, which the district court found to be not even arguably reasonable, serves, by virtue of Rule 68, to take away from the district court the discretion conferred by Rule 54(d) to decline to award costs against an unsuccessful plaintiff who in good faith sought to vindicate an important civil right. This is a question which manifestly affects, not only employment cases under Title VII of the Civil Rights Act of 1964, but other forms of litigation. Because the position which petitioner espouses could have a chilling effect on civil rights plaintiffs, the Committee files this brief in support of respondent urging affirmance of the judgment below.[1]

STATEMENT

In January, 1977, plaintiff filed suit against Delta Airlines in the Northern District of Illinois under Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-5(f)(1)). She alleged that her discharge in August, 1975 had been the result of discrimination on account of race.

In May 1977, Delta submitted to plaintiff the following offer in writing (J.A. 34):

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450 which shall include attorneys' fees together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damage.

The offer was not accepted.

[1] The parties' written consents to the filing of this brief are being filed with the clerk pursuant to Rule 36 of the Rules of the Supreme Court.

After trial, the district court granted judgment to the defendant. While finding that Delta improperly subjected plaintiff to a physical examination and had taken stern measures against blacks in general and plaintiff in particular (J.A. 29-30), the court concluded that plaintiff had not established that Delta's employment practices were racially premised (J.A. 32).

In entering judgment for Delta, the court ordered that each side "bear its own costs of litigation" (J.A. 32). Delta moved for reassessment of costs, claiming that, in view of its offer of judgment for $450 in May 1977, costs had to be assessed against plaintiff by mandate of Rule 68. The district court denied the motion (J.A. 14). It held that, "in order to be effective, a Rule 68 offer must be made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable" (J.A. 11). Noting that the Rule was intended to encourage early settlements of litigation, the court said (J.A. 11):

> If the purpose is to encourage settlement, it is impossible for this Court to concede that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.

The court of appeals affirmed the district court, both on the merits and on its interpretation of Rule 68. Noting Delta's argument that any offer of judgment under Rule 68 would serve to shift cost liability if plaintiff did not ultimately recover, the court below said (J.A. 5):

> If that were so, a minimal Rule 68 offer made in bad faith could become a routine practice by defendants seeking cheap insurance against costs. The useful vitality of Rule 68 would be damaged. Unrealistic use of the rule would not encourage settlements, avoid protracted litigation, or relieve courts of vexatious litigation.

The court below pointed out that, at the time the offer of $450 was tendered, plaintiff's damages from loss of employment exceeded $20,000, not including costs and attorneys' fees, and that, if successful, plaintiff would have sought reinstatement as a stewardess. It noted that her claim was not frivolous; that she had presented some evidence suggesting racial bias (J.A. 5). It concluded that, against that general background, Delta's Rule 68 offer of judgment was "not of such significance in the context of this case to justify serious consideration by the plaintiff." At least in Title VII cases, the court held, Rule 68 should be given a liberal and not a technical interpretation (J.A. 7).

SUMMARY OF ARGUMENT

On its face, Rule 68 shows that it was designed to apply to the situation where a defendant admits liability but disputes the extent of relief sought by the plaintiff. The history of the Rule confirms this conclusion. It apparently grew out of the common law practice of permitting a defendant to deposit in court the money he admitted was due in order to stop the running of interest and costs. This was an admission of liability. Indeed, under the modern codification of that practice in Rule 67 of the Federal Rules, a deposit is not allowed if the defendant still disputes all liability.

For this reason Rule 68 may properly be interpreted as applying only where the plaintiff does recover judgment, although for less than the amount offered. Rule 68 mandates liability for costs on a party who otherwise would be entitled to recover, rather than pay, costs, *i.e.*, a successful plaintiff. It should not be read to relate to the wholly different situation of an unsuccessful plaintiff who would normally be required to pay costs, but who a court for good reason decides should be freed of that obligation.

In any event, Rule 68 does not apply to a proposal which, although in form an offer of judgment, is in reality nothing more than a general denial and thus a sham. Even in as technical a field as tax law, this Court has recognized that a transaction which in form would qualify as a basis for a deduction need not be so treated where the transaction had no substance in reality. *Knetsch* v. *United States*, 364 U.S. 361 (1960); *Gregory* v. *Helvering*, 293 U.S. 165, 170 (1940).

Thus, the interpretation of Rule 68 as not applying to an offer which is not genuine does not read into the rule words which the framers did not put there. It merely interprets the rule, as statutes have always been interpreted, in a way which accords with its purpose and prevents absurd results.

ARGUMENT

RULE 68 DOES NOT APPLY TO A PROPOSAL WHICH IS NOT A GENUINE OFFER OF JUDGMENT

The award of costs at the conclusion of a case is governed by Rule 54(d), F.R. Civ. P., which provides that, except where there is express provision by statute or rule, costs will be allowed to the prevailing party as of course "unless the court otherwise directs." This has been construed to vest in the district court discretion as to the award of costs. *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 232-236 (1964); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 175, 184 (1946). This discretion will not be overruled except for gross abuse. *Farmer* v. *Arabian American Oil Co.*, *supra*; *Missouri Pacific R.* v. *Star City Gravel Co., Inc.*, 592 F.2d 455, 460 (8th Cir. 1979). Here the district court, in the exercise of its discretion, properly decided that each party should bear its own costs.[2]

[2] In this Court, petitioner raises a question not argued below as to whether the district court abused its discretion in denying

Relying on the use of the word "must" in Rule 68, petitioner argues that, in view of its $450 offer in May 1977, the district court was governed by a rule (i.e. Rule 68) which obliged it to award costs against the plaintiff since, having lost on the merits, she recovered less than the offer which she rejected. We do not dispute the position that, where a defendant makes a genuine offer of judgment which admits liability but questions the amount of damages or other relief claimed, a plaintiff who recovers less than the amount offered must be held liable for costs incurred after the offer was rejected. Our position is that in this case Rule 68 did not apply both because plaintiff did not recover judgment and because defendant's offer was not a genuine offer of judgment within the purview of Rule 68. In the circumstances of this case, the offer of $450 which, as the courts below found, was not even arguably reasonable, was only in form but not in substance, an offer of judgment. It was in essence no more than a general denial of any liability. It therefore did not operate to bring Rule 68 into operation.

A. The Language And History of Rule 68 Show That It Was Intended to Apply Only to the Situation Where a Defendant Admits Liability but Disputes the Extent of the Relief Sought.

On its face, Rule 68 shows that it was intended to cover only the situation where a defendant admits liability but disputes the extent of the relief claimed by a plaintiff. Under the rule, the offer must be "to allow judgment to be taken." The rule then provides that if "the judgment finally obtained by the offeree" is not more favorable than the offer, the offeree must bear the costs incurred by the offeror after rejection. Manifestly, this assumes a situation where the offeree recovers a judgment.

The history of the rule confirms that it was intended to relate to the situation where a plaintiff insists on greater relief than is offered by a defendant who does not dispute liability. As petitioner states (Pet. Br. 8), although offers of judgment were not introduced into federal practice until 1938, statutory provisions for offers of judgment had existed for a long time before that in many states. (See in addition to the cases cited at fn. 5 of petitioner's brief, *Florence Oil & Refining Company* v. *Farrar*, 119 Fed. 150 (8th Cir. 1902); *Doutritt* v. *Finch*, 84 Cal. 214, 14 P. 929 (1890); *Kaw Valley Fair Association* v. *Miller*, 42 Kan. 20, 21 P. 794 (1889).) The provisions seem to have grown out of the practice, known at common law, whereby a defendant could pay into court the money he admitted was due in order to stop the running of interest and costs. *See Kaw Valley Fair Association* v. *Miller*, *supra*. When money was paid into court, the depositor lost control of it permanently. *See Bissell* v. *Heyward*, 96 U.S. 580 (1878); *Hendon* v. *Bankers Life Co.*, 88 F. Supp. 977 (W.D. Mo. 1950). Under the modern equivalent of that practice, embodied in Rule 67 of the Rules of Civil Procedure, a deposit in court for the purpose of stopping interest and costs will not be allowed if the offeror disputes the fact that any money is due. *Blasini-Stern* v. *Beechnut Life Savers Corp.*, 429 F. Supp. 533, 534 (D. Puerto Rico 1975), *Dinkin* v. *General Aniline and Film Corp.*, 214 F. Supp. 281, 283 (S.D.N.Y. 1963). In other words, an admission of some liability is inherent in the deposit.

costs to it under Rule 54. Although not called upon to pass directly on that issue, both the district court and the court of appeals indicated that there was good reason for the district court's action in this respect. They pointed out that plaintiff's claim was not frivolous and that she had presented some evidence of racial bias. They must also have been aware that she was an unemployed stewardess without financial resources who had to bear her own litigation costs. Under these circumstances the courts below could properly find that it would be inequitable to put the burden of costs on the losing party.

That Rule 68 was understood as relating to the situation where the dispute between the parties related to relief, rather than liability, is confirmed by the decision in *Cover* v. *Chicago Eye Shield Co.*, 136 F.2d 374 (7th Cir.), *cert. denied*, 320 U.S. 749 (1943), interpreting the first version of Rule 68. As originally promulgated, the rule provided only that an offer of judgment must be made at least ten days before trial. In an action for patent infringement, where trial was customarily in two stages, (one to determine validity and the other damages for infringement), the court held that an offer of judgment ten days before the hearing on accountability but long after the trial on validity was timely since only after validity had been established could there be any issue as to the amount due. This interpretation, that an offer of judgment could await the determination of liability, was subsequently embodied in the present rule. It is a further indication that the rule deals with disputes as to relief, and not as to liability.

For this reason, there is considerable merit in the suggestion by the author of the only extended comment on Rule 68 which we have found, that the rule should apply only where the plaintiff prevails to some extent, however minor. *See Rule 68: a New Tool for Litigation*, 1978 DUKE L.J. 889, 895.

The suggested interpretation of Rule 68 limits it to the situation which is clearly its main thrust—the protection of a defendant who does not dispute liability but disputes the extent of relief sought. It finds support in an early New York decision interpreting the New York statute which is the forerunner of the federal rule. *See Connally* v. *Hyams*, 42 App. Div. 63, 58 N.Y.S. 932 (1899), holding that the New York statute did not apply to a suit in equity which was dismissed without costs to either party. The suggested interpretation of the Rule does what petitioner urges should be done; it preserves

the individual integrity of each federal rule in its own sphere (*see* Pet. Br. 14). Rule 68 mandates liability for costs on a party who otherwise would be entitled to recover rather than pay costs, *i.e.*, a successful plaintiff. It should not be read to relate to the wholly different situation of an unsuccessful plaintiff who would normally be required to pay costs but who a court for good reason decides should be relieved of costs. Thus the interpretation of Rule 68 as applying only where a plaintiff recovers judgment, rather than the position for which petitioner contends, properly harmonizes Rule 68 with Rule 54(d).

That this is so becomes evident when one considers the application of Rule 68 to class actions. If, as petitioner contends, any offer of judgment, no matter how small or how unreasonable, serves to require that costs thereafter be taxed against a plaintiff who proves finally to be unsuccessful, then a class representative, faced with an offer of judgment, will, if he has even a slight doubt as to the merits of his case, be under an obligation to present the matter to the court as an offer of compromise under Rule 23(d). Thus a court would, in effect, be itself forced, at an early stage in the proceeding, to make a judgment as to the ultimate merits, rather than to pass on a genuine offer of settlement. This aids neither the parties nor the courts. A mechanical interpretation of Rule 68, so at odds with its real purpose, should be rejected. Rule 1 mandates that the rules be construed "to secure the just, speedy, and inexpensive determination of every action." The interpretation of Rule 68 as applying only in the situation where the offeree does recover judgment, although for less than the amount offered, harmonizes Rule 68 with Rule 54(d) and Rule 23(d). It assures that a token offer will not serve to defeat the court's discretion conferred by Rule 54.

B. Rule 68 Does Not Apply to a Proposal Which, Although in Form an Offer of Judgment, Is in Reality Nothing More Than a General Denial

The judgment below may also be affirmed on the narrower ground that there was in this case no genuine offer of judgment within the purview of Rule 68. As the district court noted, under the circumstances of this case, petitioner's offer was not even arguably reasonable. Petitioner could not possibly have believed that if it was liable at all, its liability could be limited to an amount approaching $450. When its offer was made, loss of earnings alone amounted to approximately $20,000, without consideration of costs and attorneys' fees. Delta certainly was not truly admitting liability; it specifically stated that its offer was not to be so construed. Thus the offer, although in the form of an offer of judgment, was in reality nothing more than a general denial. Rule 68 does not apply to such an offer.

The issue here is genuineness, rather than reasonableness. If a contract called for delivery of a diamond, there might be a question as to whether a cheap industrial diamond fulfilled the contract; there could be no question that a counterfeit diamond would not. Here the offer of judgment was a counterfeit, an offer which was admittedly made for the purpose of accomplishing formal compliance with Rule 68 but, in the circumstances, with no expectation, not even an arguably reasonable expectation, that the amount offered would be adequate to compensate plaintiff for the injury alleged if defendant were found liable. It was a formal offer without substance other than as a general denial.

The courts have recognized that an action which is mere form without substance is a sham transaction which does not fall within the coverage of a statute despite the appearance of compliance. In as technical a field as taxation, this Court has held that a scheme which on its face required the payment of interest did not justify the deduction normally allowed for interest payments because the scheme was a sham without a real indebtedness. *Knetsch* v. *United States*, 364 U.S. 361, 367 (1960). It quoted with approval its prior decision *Gregory* v. *Helvering*, 293 U.S. 165, 170 (1935) holding that an alleged reorganization was a sham: "To do otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." So here, to treat petitioner's offer as a serious one in the circumstances of this case would be to exalt form over substance and deprive Rule 68 of serious meaning.

Since the issue is genuineness, and not reasonableness, petitioner's elaborate argument that it would be improper to read reasonableness into Rule 68 is irrelevant. There is a difference between a genuine offer and a reasonable one, although of course, the reasonableness of the offer would have a bearing on whether it is genuine. An offer may be genuine if it admits liability, even though it may seem to the offeree unreasonable. Such an offer may well fall within Rule 68 even though the offeree reasonably rejected it. Thus in *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974), the court pointed out that the offer there made, although for only $25.00, was reasonable because the defendant admitted liability and agreed to discontinue infringement. That decision supports, rather than negates, our position in that the court found it necessary to overrule the plaintiff's contention there that the offer was a sham. The implication is that, if it were, Rule 68 would not have applied.

An offer which is not genuine is no more an offer for the purposes of Rule 68 than the payment of interest for a theoretical indebtedness was a true deduction for tax purposes in the *Knetsch* case, *supra*. Indeed, so much has genuineness been assumed as necessary for a valid

offer of judgment under Rule 68 that the courts have talked in terms of a reasonable or proper offer even when there was no issue with respect thereto. Thus, in *Gay* v. *Waiters Union*, (N.D. Cal. 1980), 22 FEP Cases 1149, 1150, the court said that under Rule 68, an award of costs is mandatory "provided the offer was reasonable and in good faith." In *Honea* v. *Crescent Food Truck Sales, Inc.*, 394 F. Supp. 201 (E.D. La. 1975), the court said that "if a reasonable offer is spurned, Rule 68 of the Federal Rules of Civil Procedure provides a manner in which a party can stop costs from accruing." In *Perkins* v. *New Orleans Athletic Club*, 429 F. Supp. 661, 666 (E.D. La. 1976) the court said that the rules provide a procedure whereby defendant "may offer what is really due." An interpretation of Rule 68 as not applying to offers which are not genuine thus does not require reading into the rule words which the framers of the Rules failed to insert. It merely interprets the words of the rule in their ordinary meaning as applying to a real, not a counterfeit, offer of judgment.

There is no difficulty in implementing this position. It is certainly as easy to determine whether a proposal is genuinely an offer of judgment as it is to determine whether a plan involving payment of interest involves a genuine indebtedness. The district court, we think, has articulated a standard which is appropriate and easily applied. If an offer is in the circumstances of a particular case, not even "arguably reasonable", it is not a genuine offer of judgment, but a sham. It is a sham because it was not intended to induce the plaintiff to settle the case but merely to constitute a device to take away from the district court the discretion not to impose costs against an unsuccessful plaintiff. This Court should not allow a salutary rule to be misused for such an unjust purpose.

It is well established that, in interpreting a statute, the courts look, not only to a particular clause but to the statute as a whole, and interpret it in light of its purpose. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250 (1970). A literal reading of a statute which leads to absurd results is to be avoided where the statute can be interpreted in a way which better comports with its purpose. *United Steelworkers* v. *Weber*, 443 U.S. 193, 201 (1979); *Haggar* v. *Helvering*, 308 U.S. 389, 394 (1940). The interpretation of Rule 68 which we here suggest prevents a token offer from serving to deprive district courts of their discretion to decline to award costs against a plaintiff who in good faith, even if unsuccessfully, sought to vindicate an important civil right. Rule 68, which was designed to promote settlements, should be interpreted as relating only to genuine offers to permit judgment against the offeror.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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QUESTIONS PRESENTED

I. Whether the offer of judgment failed to comply with the requirements of Rule 68?

II. Whether the District Court and the Court of Appeals abused their discretion in denying Delta's motion for costs?

III. Whether the Court of Appeals erred in examining and balancing the policies of Title VII of the Civil Rights Act of 1964 and Rule 68 of the Federal Rules of Civil Procedure?

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MISCELLANEOUS

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-814

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Jt. App. pp. 2-7)[1] is reported at 600 F.2d 699. The decision of the District Court (Jt. App. pp. 8-14) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1979. On August 28, 1979 Delta's timely petition for rehearing and suggestion for rehearing en banc was denied. (Jt. App. p. 1). Delta's petition for a writ of certiorari was filed within ninety days thereafter and was granted on April 21, 1980.

STATUTES AND RULES INVOLVED

The relevant statutes and rules are Title VII of the Civil Rights Act of 1964, 42 U.S.C.§2000e, et seq. and Rule 68 of the Federal Rules of Civil Procedure.

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[1] Jt. App. refers to the Joint Appendix filed with the Court by Delta Air Lines, Inc. and Rosemary august as provided in Rule 30 of the Rules of the Court.

STATEMENT OF THE CASE

Amicus curiae, the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), concurs with petitioner's statement of the case as to the sequence of events. It does not concur in petitioner's description of the decisions of the District Court and the Court of Appeals below. The District Court, in denying petitioner's motion for costs pursuant to Rule 68 of the Federal Rules of Civil Procedure ("Rule 68") decided that in order for an offer of judgment to trigger the provisions of Rule 68, the offer must be "at least arguably reasonable" and a good faith attempt to settle the parties' litigation. (Jt. App. p. 11) The District Court considered the time at which the offer was made, approximately four months after the institution of the suit, the amount of the offer, $450 to include all costs and attorneys' fees incurred to the date of the offer, the decision of the Equal Employment Opportunity

Commission which encouraged August to bring suit, and the relief sought by the respondent. The District Court concluded that the offer of $450 could only have been effective if respondent's claim were totally lacking in merit, a situation which was not before it in this case. (Jt. App. p. 12) The offer, therefore, was not an effective offer under all the circumstances, compelling the application of Rule 68.

The Court of Appeals for the Seventh Circuit, affirming the District Court, relied on the significant national policies embodied in Title VII, 42 U.S.C. §§2000e, et seq. It rejected a technical interpretation of Rule 68,a procedural rule, which would have the effect of chilling the pursuit of those overriding objectives. (Jt. App. p. 6) The Court of Appeals ruled that, at least in Title VII cases, the trial judge may exercise threshold discretion in ruling on a motion for costs pursuant to Rule 68 and may consider factors such as the time the offer

was made, the final outcome of the case, and the good faith and reasonable relationship of the offer to the issues, litigation risks, and expenses involved in the case. The Court also warned that a literal reading of Rule 68 would encourage bad faith offers by defendants, and thereby denigrate Rule 68 itself and its policy of encouraging settlements. (Jt. App. p. 5)

SUMMARY OF ARGUMENT

The respondent's offer of judgment in the instant case failed to comply with the requirements of Rule 68 of the Federal Rules of Civil Procedure in that it did not encompass the relief prayed for by respondent, nor did it include an adequate amount for attorneys' fees, a part of costs in employment discrimination cases. Neither the District Court nor the Court of Appeals erred in denying respondent's motion for costs, particularly in view of the significant national policies underlying Title VII. Further, by reviewing the policies underlying both provisions, the Court of Appeals promoted the policies of the Federal Rules of Civil Procedure and Rule 68.

ARGUMENT

I. The Offer of Judgment Failed to Comply with the Requirements of Rule 68

In order to trigger the cost-shifting provisions of Rule 68, an offer of judgment must reasonably encompass the relief prayed for. Moore's Federal Practice §6804 (2d ed. 1975); Wright & Miller, Federal Practice & Procedure, §3001 (1973). The need for careful analysis of an offer of judgment in a Title VII case is particularly compelling when the nature of the relief sought is considered.

One element of relief in a Title VII suit is equitable relief to remedy past discrimination and to prohibit future discrimination. The goal of this relief is to make a victim of discrimination "whole," as expressed by this Court in Albermarle Paper Company v. Moody, 422 U.S. 405 (1975):

> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects

> of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154, 422 U.S. at 418.

In addition, Title VII authorizes awards of back pay, reinstatement, and costs, which include attorneys' fees. 42 U.S.C. §2000e-5(k).

Petitioner Delta's offer of judgment was not in an amount adequate to cover costs, including attorneys' fees, to the date of the offer. It failed to offer any equitable relief It expressly disclaimed liability, offered no back pay, and did not offer reinstatement. Thus, Delta's offer was not an "offer of judgment" within the meaning of Rule 68.

Although there are but a few cases which deal with offers of judgment under Rule 68, two recent cases are helpful regarding sufficiency of the relief offered, Mr. Hangar, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974), and Scheriff v. Beck, 452 F. Supp. 1254 (D. Colo. 1978). In Mr. Hangar, Inc., supra, the most oft-cited case dealing with Rule 68, the plaintiff sought both legal

infringement of its hanger design. The defendants made an offer of judgment of $25 in damages, an acknowledgement of the plaintiff's rights, an admission of the infringment, and a promise to cease its infringing practices. The offer was rejected, and the trial resulted in a judgment for defendant. Following defendant's motion for costs from the date of the offer, the district court reviewed the terms of the offer, holding:

> If costs are to be imposed pursuant to the provisions of Rule 68 a preliminary finding is required that an appropriate offer of judgment has been made in compliance with that rule. 63 F.R.D. at 610.

The court found that the defendants' offer of judgment was reasonable because, while it only offered $25 in damages, it acknowledged the plaintiff's rights, admitted the infringement, and promised to cease the infringing practices. 63 F.R.D. at 610. The offer afforded plaintiff substantially all the relief prayed for in the complaint, and thus, complied

with Rule 68.

In Scheriff v. Beck, supra, the district court examined an offer of judgment in a civil rights action under 42 U.S.C. §1983. The plaintiff rejected the defendants' offer of judgment of $2,200, with costs but not including attorneys' fees, but recovered only $500 following the trial. The district court reviewed the offer, and found it insufficient because the offer failed to include attorneys' fees. "Rule 68 does not permit an offeror to choose which accrued costs he is willing to pay." 452 F. Supp. at 1260.

The Scheriff court was correct. The relief offered must include all costs then incurred by the plaintiff. Wright & Miller, Federal Practice & Procedure, §3002, Moore's Federal Practice, §68.04, United States v. Mortenson, 11 F.R.D. 516, 517 (D. Neb. 1951). In civil rights actions, attorneys' fees are a recognized part of costs. §706(k) of Title VII, 42 U.S.C. §2003-5(k) and the Civil Rights Attorneys' Fees Award Act of 1976 42 U.S.C.

§1988, as well as some ninety federal attorneys' fees statutes, direct that attorneys' fees be assessed as costs.[1]

In the instant case, the purported offer of judgment made by Delta did not fulfill the requirements of Rule 68. The failure of Delta to include in its offer of judgment any equitable relief, backpay or reinstatement, any colorably reasonable amount for costs, including attorneys' fees, and its failure to admit liability caused the offer to fail as a proper Rule 68 offer of judgment. Thus, the rulings of both the District Court and the Court of Appeals should be upheld.

II. Neither the District Court Nor the Court of Appeals Erred in Denying Delta Recovery of Litigation Costs

It has been generally recognized that the

[1] See e.g. Freedom of Information Act, 5 U.S.C. §552(a)(4)(E)(1976); Bankruptcy Act, 11 U.S.C. §104(a)(1)(1970); Clayton Act, 15 U.S.C. §15 (1976)

District Court in Title VII action is particulary suited to perform the task of determining the reasonableness of settlement agreements. Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977). While the decision of the Fifth Circuit was directed toward settlement agreements, the principle is no less applicable in cases where the district court is called upon to review the sufficiency of offers of judgment. The District Court herein was in the best position to determine whether any proposed settlement, or offer of judgment, met the "make whole" remedial policies of Title VII litigation. The District Court properly reviewed the contents of the offer, the time at which the offer was made, the merits of respondent August's case, and the remedial policies of Title VII. The District Court concluded that there was evidence supporting August's claim of racial bias, and that August had been encouraged by the findings of the Equal Employment Opportunity Commission. August sought

damages in her complaint, not including attorneys' fees and costs, of $20,000 in backpay, reinstatement, and a prohibition against future discrimination at the time the offer was made. After the litigation was four months old, Delta offered the sum of $450, which amount was to include costs and attorneys' fees to date, an offer which the district court noted would hardly be sufficient to cover costs and attorneys' fees incurred to the date of offer. The district court concluded that respondent August acted reasonably in refusing petitioner's offer. The Court of Appeals upheld these findings.

Petitioner now claims that the offer of judgment was reasonable because that concept "may only be measured in terms of the results, not the expectations of litigation; the result and judgment proved that Delta's offer was more than reasonable." (Pet. Brief, p. 24) This Court has explicitly and unequivocably rejected this unrealistic interpretation of the term "reasonableness."

In discussing whether the institution of a Title VII action was reasonable, this Court stated in Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978):

> [I]t is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that because the plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most air-tight claims, but seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one believes that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or facts appear unquestionable or unfavorable at the outset, a party may have entirely reasonable ground for bringing suit. 434 U.S. at 421-422.

The uncertainties surrounding the decision to bring an action apply equally to the decision to accept or reject an offer of judgment. Because an action results in a judgment for defendant, it does not follow that bringing the action was unreasonable. Likewise,

because a plaintiff rejects an offer of judgment and eventually recovers less than the offer, it does not follow that the rejection was unreasonable. The standard of reviewing the reasonableness of an offer of judgment cannot be result oriented. Rather, that standard is a function of the time at which the offer was made and its content, in relation to the merits of the plaintiff's case. Using this standard, including the relief sought by the plaintiff, the District Court concluded that Delta's offer was unreasonable. These findings were examined and upheld by the Court of Appeals and should not be disturbed.

III. Rule 68 Cannot Be Viewed Alone, But Must Be Construed With Title VII of the Civil Rights Act of 1964

A. Principles of Statutory Construction Require Examination of Policies Underlying Conflicting Statutes

The offer of judgment made to August failed to meet the requirements of Rule 68, and there was no abuse of discretion by either court below in examining the terms of the offer to determine its propriety under Rule 68. However, to the extent that the provisions of Title VII and Rule 68 conflict in the instant case, the District Court and the Court of Appeals correctly examined the policies of both statutes and construed them to best effectuate the provisions of both.

In the Brief for petitioner, Delta Air Lines ("Delta"), deals at length with the apparently unquestionable language of Rule 68. Delta's view, however, is somewhat myopic, isolating the rule from interaction with any other statutory provisions. In addition, Delta's approach to Rule 68 is entirely inflexible, a construction which was not intended by the drafters of the Federal

Rules of Civil Procedure.[2]

For example, Delta argues that there is only one meaning for the word "must," that it can only be interpreted as an imperative. Many courts, however, have taken the position that terms which are generally mandatory may sometimes be directory and terms which are generally construed as directory may, in some cases, be mandatory. Wilshire Oil Company of California v. Costello, 345 F.2d 241, 243 (9th Cir. 1965). Indeed, as this Court recognized forty five years ago, language of command provides a significant, though not controlling, test of the mandatory character

[2] Rule 1 of the Federal Rules of Civil Procedure requires the court to construe the rules liberally to promote the ends of justice and facilitate decisions on the merits, rather than determinations on technicalities. Bickman v. Taylor, 329 U.S. 495 (1945), Wright & Miller, Federal Practice & Procedure, §1029 (1969).

of a statutory provision. Escoe v. Zerbst, 295 U.S. 490, 493 (1935). The interpretation of mandatory and directory terms depends also upon the background circumstances, the context in which the words are used, and the intention of the legislature. United States v. Reed, 411 F.2d 381, 383 (9th Cir. 1970). Particularly, where two statutes conflict, as here, the court should examine the purposes of each statute through the extrinsic aids available. Train v. Colorado Public Interest Research Interest Group, 426 U.S. 1, 10 (1976); United States v. American Trucking Association, 310 U.S. 534, 543-544 (1940), as quoted in Myers v. Hollister, 226 F.2d 346, 348 (D.C. Cir. 1955). If that examination reveals a convincing argument to the contrary, terms which are generally considered mandatory may be directory only. Manatee County, Florida v. Train, 583 F.2d 179, 182 (5th Cir. 1978); Sierra v. Train, 557 F.2d 485, 489 (5th Cir. 1977); C. Sands,

Sutherlands Statutory Construction, §25.04 (4th ed. 1973).[3]

A convincing argument was made by both the District Court and the Court of Appeals in the instant case that the seemingly mandatory language of Rule 68 must not be applied mechanically. Unthinkingly applying a mandatory rule that a plaintiff should be charged with defendant's costs in the event that the judgment finally secured by plaintiff is less favorable than defendant's offer of judgment, would thwart the policies behind Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., and lead to absurd and harsh results. The Court of Appeals correctly ruled that Rule 68 cannot be allowed to defeat one of the primary purposes of Title VII, that of encouraging victims of discrimination to seek private redress in the courts. Myers v. Hollister, 226 F.2d 346, 348 (D.C. Cir. 1955). Contrary to Delta's argument that the District Court erred in examining the sufficiency of Delta's offer, the District Court took the only action possible in light of the conflict presented.

Faced with two conflicting statutes, the District Court and the Court of Appeals properly looked to the purposes underlying both enactments. Fanning v. United Fruit Company, 355 F.2d 147, 149 (4th Cir. 1966). The Court of Appeals for the Tenth Circuit was faced with a similar problem in United States v. Dunn, 545 F.2d 1281 (10th Cir. 1976), in which the court emphasized:

> The problem is one of construing two statutes, neither enacted in any obvious contemplation of the other, but each bearing upon the other when both are involved in the factual situation presented. In such circumstances, we should seek a solution which avoids violence to the terms of either but which brings both into

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3 In statutes which guide the discharge of a governmental official's duties terms which propose to secure order and dispatch in proceedings are usually construed as directory, whether or not worded in the comparative, especially when in the alternative is harshness or absurdity. French v. Edwards, 80 U.S. (13 Wall.) 506, 511 (1872); Ralpho v. Bell, 569 F.2d 607, 627 (D.C. Cir. 1977) (policy of Micronesian Claims Act to redress damage claims during World War II overrode provisions in statute calling for end to agency's handling of claims.)

> correlation, since to construe either in isolation from the other would thwart the intention of Congress. 545 F.2d at 1282.

B. The Court Below Correctly Examined the Policies of Rule 68 and Title VII

The Civil Rights Act of 1964, including Title VII, is designed to encourage private redress of civil rights violations. Relief which may be sought by victims of discrimination includes injunctive relief against employers to right past wrongs and prohibit future discrimination, reinstatement of jobs, and back pay. In addition, to encourage private enforcement, Congress provided for the award of attorneys' fees and costs to prevailing parties.[4] Congress thus recognized that one of the greatest obstacles to private suits to eliminate discrimination was the cost of litigation and representation by competent counsel.

> When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction he does so not for himself alone but also as a "private attorney general" vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees. . . to encourage individuals injured by racial discrimination to seek judicial relief under Title II. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

The irony of Delta's position in the instant case is that even successful plaintiffs, though they may be entitled to an award of attorneys' fees and costs as prevailing parties against defendants, may also be subject to an award to defendants of costs, including attorneys' fees, where defendants make an offer of judgment which exceeds the eventual judgment recovered by plaintiff. Such a result is untenable. More importantly, Delta's position flies in the face of the express intent of Congress to promote access to the courts in civil rights cases. Congress could not have intended one of the Federal

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4 See, e.g. §706(k) of Title VII, 42 U.S.C. §200e-5(k); Attorneys' Fees Award Act of 1976, 42 U.S.C. §1988.

Rules of Civil Procedure, meant to effectuate swift and fair adjudication of lawsuits, to thwart the intent of an entire body of law designed to promote private actions for redress of civil rights violations.

Under Delta's reading of Rule 68, a nominal offer by a defendant, even if admittedly unreasonable or in bad faith, would submit a plaintiff to the risk of a substantial financial burden. This form of "cheap insurance" cannot be permitted. The case is rare, indeed, that counsel or a party can accurately forecast the precise outcome of litigation. The fear of a mandatory monetary award could unduly pressure a plaintiff to opt for an unreasonable offer of judgment, or worse, to abandon the cause of action altogether and quite apart from the merits of a claim. As this court noted recently, in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1974), because a plaintiff does not ultimately prevail, it does not follow that the action was unreasonable or without some foundation.

> That §706(k) [42 U.S.C. §2000e-5(k)] allows fees awards only to prevailing private plaintiffs should assure this statutory provision will not in itself operate as an incentive to the bringing of claims that have little chance of success. [Footnote omitted.] To take this further step of assessing attorneys' fees against plaintiffs simply because they do not finally prevail will substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorneys' fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiffs continued to litigate after it clearly became so. [Emphasis in original] 434 U.S. at 422.

In Christiansburg Garment Co. v. EEOC, supra, this Court adopted the rationale of the Courts of Appeals for the Fourth and Second Circuits[5] that attorneys' fees should only be awarded to prevailing defendants where the plaintiff's action was found to be unreasonable, frivolous, meritless or

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[5] United States Steel Ct. v. United States, 519 F.2d 359 (4th Cir. 1977); Carrion v. Yeshiva University, 535 F.2d 522 (2d Cir. 1977).

vexatious. In this decision, the Court interpreted the "unambiguous" statutory language of §706(k) of Title VII, 42 U.S.C. §2000e-5(k), authorizing reasonable attorneys' fees to the prevailing party in a Title VII action. The petitioner company in Christiansburg argued that in the absence of any statutory language regarding fees awards to prevailing defendants fees should ordinarily be recoverable by prevailing defendants unless special circumstances would render the award unjust. This Court rejected that mechanical application of §706(k) because it would detract from the express policy underlying Title VII actions. Similarly, this Court, for the same reason, should now reject a mechanical application of Rule 68.

Petitioner's interpretation of Rule 68 would not only wreak havoc with Title VII, but also would destroy any incentive to make a genuine offer of judgment. The purpose of Rule 68 is to encourage settlement, to encourage defendants to offer the amount

plaintiffs "might reasonably be expected to recover." Wright & Miller, Federal Practice & Procedure, §3001 (1969); Perkins v. New Orleans Athletic Club, 429 F. Supp. 661, 666 (E.D. La. 1976) (defendant can shift costs to plaintiff by offering what is really due); Honea v. Crescent Ford Truck Sales, Inc., 394 F. Supp. 201, 202 (E.D. La. 1975) (Rule 68 operates if a reasonable offer is spurned).

Discretion is the keystone to the effective functioning of the federal rules. Oliver v. Kalamazoo Board of Education, 346 F. Supp. 766, 789, n.1, (W.D. Mich. 1972), aff'd per curiam, 448 F.2d 635 (6th Cir. 1972), citing Wright & Miller, Federal Practice & Procedure, §1029 (1969):

> The rules will remain a workable system only as long as trial court judges exercise their discretion intelligently on a case by case basis; application of arbitrary rules of law to particular situations only will have a debilitating effect on the overall system.

Only by allowing the district court discretion to examine the terms of a purported offer of judgment to decide if the cost shifting provisions of Rule 68 are applicable, can the ends of justice be furthered.

C. Decisions of State Courts Allow Review of Offers of Judgments

As noted by petitioner, several states have rules similar to the federal offer of judgment rule. Contrary to Delta's assertion, however, that these rules are applied strictly and literally, several courts have arrived at the same result as the District Court and Court of Appeals in the instant case. Those cou ts examined the terms of the offer to determine the applicability of an offer of judgment rule.

In Colby v. Larson, 297 P.2d 1073 (Ore. 1956), the Supreme Court of Oregon had the opportunity to consider the effectiveness of a defendant's offer of judgment where the defendant tendered to the clerk of the court the exact amount sought by plaintiff, $372.59. Both parties sought costs against the other, defendant on the basis of the Oregon offer of judgment statute,[6] and plaintiff on the basis of the Oregon statute governing claims less than $500.[7] The court recognized the

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[6] The defendant may, at any time before trial, serve upon the plaintiff an offer to allow judgment or decree to be given against him for the sum, or the property, or to effect therein specified. . . . If the offer is not accepted. . .and if the plaintiff fails to obtain a more favorable judgment or decree, he shall not recover costs, but the defendant shall recover of him costs and disbursements from the time of the service of the offer. ORS 17.055.

[7] Plaintiff sought recovery of costs and attorneys' fees pursuant to ORS 20.080, which provided:

> In any action for damages for an injury or wrong to the person or property, or both, of another where the amount recovered is $500 or less, there shall be taxed and allowed to the plaintiff as part of the costs of the action, a reasonable amount to be fixed by the court as attorneys' fees for the prosecution of the action, if the court finds that written demand for the payment of such claim was made on the defendant not less than ten days before the commencement of the action; provided, that no attorneys' fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount not less than the damages awarded to the plaintiff.

conflict between the two sections. If the plaintiff made a written demand upon the defendant more than ten days before the commencement of the action and the defendant did not tender an amount equal to the demand prior to the commencement of the action, plaintiff was entitled to costs, including attorneys' fees. On the other hand, if the defendant offered to allow judgment to be taken against him for the sum demanded by the plaintiff after the commencement of the action but before trial, the defendant was entitled to costs.

The court held that, assuming that a proper demand was made by plaintiff, if it adopted the defendant's position, the legislative purpose of ORS 20.080 would be defeated. A defendant could ignore the plaintiff's demand before commencement of the action, later, make an offer of judgment in the amount demanded, and

> [Be] secure in the knowledge that if action should be brought he could escape payment of an attorney's fee and other costs by offering before trial to allow judgment to be given against him as provided in ORS 17.055. 297 P.2d at 1975.

Rejecting the defendant's construction, the Oregon Supreme Court ruled that this was a clear case for application of the rule that where there is a conflict between two statutes, both of which would otherwise have full force and effect, and the provisions of one are particular, special and specific, and those of the other are general, the specific provision must prevail over the general provision 297 P.2d at 1075.

The Court also looked to the general purposes underlying the two statutory provisions. The Oregon offer of judgment statute was a general statute, applicable to every kind of case at law or in equity and had been a part of the Oregon law since 1862. On the other hand, ORS 20.080 was a special statute passed in 1947, to address a particular situation. It applied only to tort actions involving

injury in the amount of $500 or less, and was undoubtedly enacted to encourage settlement without litigation of meritorious claims involving small sums.

> Frequently the injured person might forego action upon a small claim because he realized that, after paying his attorney, his net recovery would not be worth the time and trouble of a vexatious lawsuit. The legislature may have found that tortfeasors or their insurance carriers frequently rejected meritorious claims of this kind because of this known reluctance of injured persons to litigate. Claims which in honesty and fairness should have been paid were not paid, and it was to remedy this evil that the statute was passed. 297 P.2d at 1075.

Colby v. Larson, supra, is analogous to the instant case. Title VII, like ORS 20.080 was enacted for a specific purpose. The Colby Court refused to allow plaintiffs to carry the burden of litigation by the use of the offer of judgment statute. Nor would the Court allow the earlier, general statute to override the specific, later policies enunciated by the legislature. This same rationale is applicable

in the instant case. Defendants should not be allowed to use the earlier, more general provisions of Rule 68 to ride roughshod over later express Congressional intent.

In addition, several courts have allowed the trier of fact to examine the facts surrounding the offer to determine its reasonableness. In Vroman v. Kempke, 34 Wis. 2d 680, 150 N.W. 2d 423 (Wis. 1967), the Supreme Court of Wisconsin had the opportunity to examine an offer of judgment as to its reasonableness at the time it was made. The Wisconsin statute in effect at the time, §269.02, Stats., provided that "(1) after issue is joined but before trial the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against him. . ." Thereafter, if the offer is rejected and the plaintiff fails to recover a more favorable judgment, defendant shall recover costs.

In this personal injury action, the defendant made an offer of judgment shortly before selection of the jury on the day of trial. The judgment secured by plaintiffs at trial was less than the amount offered by defendant. Following the trial, defendant moved for costs. The trial court held that the offer of judgment was not timely made. The Supreme Court of Wisconsin agreed with the trial court, again, rejecting defendant's mechanical application of the offer of judgment rule. The Court acknowledged that the defendants had made their offer of judgment before the commencement of trial, in compliance with the terms of §269.02. The Court ruled, however, that the section required a defendant who sought its benefits to make his offer at a reasonable time before trial, not the last minute before trial.

Nor is it an uncommon practice to allow the trial court discretion to determine if the offer of judgment is, in fact, more favorable than the judgment finally obtained. In

Bertilacci v. Avery, 42 Mich. App. 483, 202 N.W.2d 331 (1972), the court used an equitable formula to determine if, and in fact, the offer of judgment was more favorable than the judgment finally obtained.[8] The offer of judgment in that case was for $3,000, plus $500 as costs and attorneys' fees. The judgment finally obtained by the plaintiff was in the amount of $3,000 plus costs and interest. The court ruled that the judgment finally obtained was more favorable than the offer, primarily because of the inclusion of interest.

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[8] The Michigan statute in effect at the time was GCR 1963, 519.1:

> If the judgment finally obtained by the offeree is not more favorable than the rejected offer, the offeree must pay the taxable costs incurred after the making of the offer. [Emphasis added.]

Similarly, in Herring-Hall-Marvin Safe Co. v. Balliet, 44 Nev. 94, 190 P. 76 (1920), the Supreme Court of Nevada ruled that whether or not a judgment is "more favorable" in a particular case within the meaning of the statute is a question to be determined by the trial court.

> We are of the opinion that the term "more favorable" must be construed with reference to the facts and circumstances of each particular case. While we do not go to the extent of holding that this court is without the power or authority to correct the abuse of the power conferred by this statute, we do hold that whether or not a judgment is "more favorable" in the particular case must be left to the sound discretion of the district court. 190 P. at 77.

See also Howard v. Farley, 29 How. Prac. 4 (1865) (the amount of judgment is not the only test of whether a judgment is more favorable than an offer).

State courts with similar offer of judgment statutes have also considered the comprehensiveness or validity of an offer of judgment. In Johnson v. Chapman, 223 N.Y.S. 515 (1927), and in Public Bank of New York

New York courts held that an offer of judgment which did not include interest up to the time of the offer of judgment was insufficient to operate as a valid offer of judgment. In fact, the Nevada Supreme Court, in Leeming v. Leeming, 87 Nev. 530 490 P.2d 342 (1971), refused to apply Nevada's offer of judgment statute at all to a divorce proceeding, holding that divorce cases were not the kind of action to which this rule should apply.

Other courts have required that an offer must be fair and reasonable. Benda v. Fana, 10 Ohio St. 2d 259, 227 N.E.2d 197 (Ohio 1967) (the purpose of offer of judgment statute is termination of litigation where defendant tenders to plaintiff a fair offer). In other cases, the courts simply refused to award costs to either party. Insurance Company of North America v. Twitty, 319 So.2d 141 (Fla. App. 1975); Schnute Hoffman Co. v. Sweeney, 136 Ky. 773, 125 S.W. 180 (Ky. App. 1910).

Thus, it is hardly a novel or uncommon phenomenon for courts to review offers of judgment before blindly awarding costs to defendants who made more favorable offers than the judgments finally obtained. Rather, it is the duty of courts to assess all factors, legal and factual, and arrive at a just determination of the conflict between the parties. This duty was fulfilled by the courts below.

D. The Decision of the Court of Appeals Promoted the Purpose of Rule 68

Petitioner raises the in terrorem argument that the decisions of the courts below will deprive defendants of the possibility of any pretrial resolution in Title VII actions. (Pet. Brief, p. 16) This would suggest that offers of judgment are frequently used by defendants in discrimination cases to terminate litigation. This contention is belied by the paucity of case law interpreting Rule 68 and Title VII. The fact is, that Rule 68 has been used only infrequently, especially in employment discrimination cases. Acceptance of petitioner's position, however, would result in a substantial increase in the use of offers of judgment, particularly nominal offers which every defense counsel will make.

In any event, the Lawyers' Committee does not suggest, nor did the Court of Appeals decide, that Rule 68 would be inapplicable in Title VII cases. Rather, the Court of Appeals decided, and the Lawyers' Committee concurs, that the District Court should exercise its discretion and review the terms of the offer of judgment to determine if in fact, it is a fair and effective offer of judgment. The Lawyers' Committee is not asking this Court to relieve any plaintiff of the "known consequence of his or her own conduct." (Pet. Brief, p. 16) The Lawyers' Committee is asking this Court to relieve plaintiffs of the burden of liability for defendants' costs when bad faith offers of judgment are used as "cheap insurance." It does not logically follow that because the District Court awarded

judgment to defendant in the instant case that respondent August was a "obdurate" plaintiff. Where such a plaintiff is encountered, however, and an action is vexatious or meritless, a nominal offer of judgment and an award of costs to defendants may be entirely proper, just as an award of attorneys' fees pursuant to the Court's decision in Christianburg Garment Co. v. EEOC, supra, may also be proper.

Finally, petitioner's suggestion that the policies underlying Title VII will not be undercut because Rule 68 does not effect the initiation of litigation is patently absurd. (Pet. Brief, p. 18) Title VII was not meant to increase the number of cases in court, but to encourage private redress of civil rights violations. Title VII was not designed to encourage institution of meritless suits. The outcome of litigation is unpredictable even for those with meritorious claims. By punishing those plaintiffs who reject insufficient offers of judgment, regardless of the relative merits of the claim, the national goal of eliminating civil rights violations will never be attained.

CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-814

DELTA AIR LINES, INC.,

Petitioner,

v.

ROSEMARY AUGUST,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AMICUS CURIAE

Interest of the Amicus*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members dedicated to protecting the

* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

fundamental rights of the people of the United States. When an individual's rights are violated, the ACLU often provides legal representation through volunteer cooperating attorneys who litigate on behalf of the people to restore their rights and to obtain remedies for the violation thereof. Because the decision in this case will have a considerable impact upon the ability of civil rights plaintiffs to seek vindication of their rights through litigation, the ACLU, amicus curiae, submits this brief.

Rule 68 of the Federal Rules of Civil Procedure permits a party defending a claim to make an offer to allow judgment to be taken against him in a certain amount, together with the costs then accrued, at any time more than 10 days before the trial begins. If the offer is rejected and the offeree recovers less than the amount offered,

the offeree must pay the costs incurred after the making of the offer.

At issue in this case is whether Rule 68 can be invoked at all where a plaintiff ultimately does not win at all. Also at issue is whether a bad faith or unreasonable offer is sufficient to invoke Rule 68. Stated otherwise, does Rule 68 require a defense offer to be reasonable? Here, where the defendant-employer, now petitioner, parsimoniously offered only $450 to settle a claim requesting reinstatement and $20,000 in back pay, both lower courts held that the offer was unreasonable and that Rule 68 thus could not be invoked. The ACLU, amicus curiae, agrees with the decisions of the courts below, and accordingly supports the position of the respondent here.

In this brief, amicus addresses another issue not directly before the Court:

whether, assuming arguendo the applicability of Rule 68, the "costs" allowed a defendant under Rule 68 include attorney's fees. We submit that attorney's fees are not and should not be included in Rule 68 defense costs.

SUMMARY OF ARGUMENT

Addressing the Rule 68 issues in this case, the Seventh Circuit below commented on the "high objective" of Title VII's attorney's fees provision, 42 U.S.C. §2000e-5(k), as an argument against a "technical interpretation" of Rule 68. August v. Delta Air Lines, Inc., 600 F.2d 699, 701 (7th Cir. 1979). The court of appeals' reference is a curious one because nothing in the court's opinion or in the facts suggests that the defendant-employer's attorney's fees were at issue under Rule 68. Nonetheless, because amicus believes that any

assumption that Rule 68 costs could include attorney's fees is unwarranted and contrary to the language and congressional intent behind civil rights fee-shifting legislation amicus urges recognition of the fact that defense costs under Rule 68 do not include attorney's fees.

Whenever a civil rights plaintiff prevails, by vindicating rights or by obtaining some of the benefit sought in filing suit, it is now well settled that the plaintiff is entitled to fees almost "as a matter of course." See, e.g., Gates v. Collier, 616 F.2d 1268, 1275 (5th Cir. 1980); Davis v. Murphy, 587 F.2d 362, 364 (7th Cir. 1978); see also, Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978); Northcross v. Board of Education of Memphis, 412 U.S. 427, 428 (1973); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). Since these standards are fully applicable

to a plaintiff who settles, Maher v. Gagne, 48 U.S.L.W. 4891, 4893 (U.S. June 25, 1980), any offer of judgment to a plaintiff under Rule 68 should include an offer of fees. In any event, once plaintiff accepts an offer, that plaintiff would be entitled to fees under a fee-shifting statute. Consistently, Rule 68 recognizes that "the amount or extent of liability" often "remains to be determined by further proceedings."[1/]

1/ A defendant's fee liability, as determined by further proceedings, flows from the judgment and is thus unaffected procedurally by timing requirements of the Federal Rules of Civil Procedure or of local court rules. This much was firmly established long ago by this Court in Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). There, the Court held, an application for fees is not governed by the then-existing version of Rule 59(e) concerning motions to alter or amend judgments since such an application simply is "not a request for a modification of the original decree." 307 U.S. at 170. This is because, to the extent that the amount of the fees is not determined in the decree on liability, the fee award then must be resolved in "an independent

(footnote continued on next page)

At the same time that a Rule 68 offer of judgment should include an award of fees, Rule 68's allowance of "costs" to a defendant whose reasonable offer was more than the plaintiff ultimately won does not include attorney's fees.

First, the accepted meaning of "costs," particularly as used in the Federal Rules of Civil Procedure and elsewhere, does not include fees. This understanding was made unassailable last Term in Roadway Express, Inc., v. Piper, 48 U.S.L.W. 4836 (U.S. June 23, 1980), where this Court held that the word "costs" as used in 28 U.S.C. §1927 does not include fees.

(footnote continued from preceding page)

proceeding supplemental to the original proceeding." Id. For the same reasons, fee applications are not necessarily governed by local court rules concerning the timing for bills of costs, for the considerations involved in determining fee awards are not of a routine character like ordinary taxable costs." 307 U.S. at 168.

Second, in enacting civil rights fee-shifting legislation, Congress never has explicitly or even implicitly amended Rule 68. Quite to the contrary, Congress directed, when it enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 as amended, that prevailing plaintiffs "should ordinarily recover an attorney's fee" even when they merely "vindicate rights through a consent judgment or without formally obtaining relief," whereas a defendant can recover fees only when the plaintiff is "shown to have litigated in 'bad faith.'" S. Rep. No. 94-1011, 94th Cong., 2d Sess., 4-5 (1976); see also, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 6-7 (1976). A nearly identical dual standard governs fee awards under Title VII, Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). To hold that Rule 68 costs could include a defendant's fees as a matter of course would wholly

violate the congressional purposes and intent behind all civil rights fee-shifting legislation.

ARGUMENT

ANY ALLOWANCE OF "COSTS" TO A DEFENDANT, AS THE WORD IS USED IN RULE 68, DOES NOT INCLUDE ENTITLEMENT TO ATTORNEY'S FEES

I. The Accepted Meaning of the Word "Costs" Does Not Include Attorney's Fees

Any question about the meaning of "costs" in Rule 68 is largely resolved by this Court' recent opinion in Roadway Express, Inc. v. Piper, 48 U.S.L.W. 4836 (U.S. June 23, 1980), which held, inter alia, that the word "costs" as used in 28 U.S.C. §1927 does not include attorney's fees. The Court found that §1927, which allows a court to tax costs against an attorney who behaves "unreasonably" or

"vexatiously," should be read together with 28 U.S.C. §1920, since both derived from the Fee Bill of 1853. As such, §1920--and thus §1927--limits taxable costs to clerks' and marshals' fees, court reporter charges, printing and witness fees, copying costs, interpreting costs, and the fees of court-appointed experts, but does not allow attorney's fees.[2/] Moreover, the Court found that the "contemporaneous understanding" of the term costs at the time that §1927's predecessor was first enacted (in the year 1813) excluded attorney's fees and, in fact, the "American rule" has continued to be that attorney's fees are ordinarily not recoverable as costs. 48 U.S.L.W. at 4836; see also, Fleischmann Corp. v. Maier Brewing,

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[2/] 28 U.S.C. §1920 does allow "attorney's docket fees," by reference to 28 U.S.C. §1923, but these of course are quite distinct from attorney's fees themselves.

386 U.S. 714, 717-718 (1967). Finally, the Court in Roadway Express found that the civi rights fee-shifting statutes,[3/] which allow attorney's fees "as part of the costs," did not amend the meaning of costs in 28 U.S.C. §1927.

The meaning of "costs" as used in Rule 68 of the Federal Rules of Civil Procedure is similarly limited to taxable costs. The "contemporaneous understanding" of costs when the Rules were promulgated in 1938 did not include attorney's fees any more than it did in 1813. See Fleischmann v. Maier

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[3/] Roadway Express involved the attorney's fee provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 e-5(k), and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, both of which provide in part that "the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs." Substantially identical provisions are found in Title II of the 1964 Civil Rights Act, 42 U.S.C. §2000 a-3(b); the Civil Rights Act of 1968, 42 U.S.C. §3612(c); the Equal Employment Opportunity Amendment of 1972, 42 U.S.C.

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Brewing, 386 U.S. 714, 717-718 (1967). The brief legislative history of Rule 68 found in the Advisory Committee Notes to Rule 68 similarly indicates no intent to deviate from the common meaning of costs.

In an analogous situation, two courts of appeals recently decided that "costs," as used in Rule 39 of the Federal Rules of Appellate Procedure, do not include attorney's fees. Vasquez v. Flemming, 617 F.2d 334 (3rd Cir. 1980); Davis v. Murphy, 587 F.2d 362 (7th Cir. 1978). The contention that appellate costs should include fees arguably is much stronger than same argument

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§2000 e-16(b); and the Voting Rights Act Extension of 1975, 42 U.S.C. §1973 l(e). In general, these provisions are construed interchangeably. Roadway Express, Inc. v. Piper, 48 U.S.L.W. 4836, 4838 n.5 (U.S. June 23, 1980); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

with respect to Rule 68, since the Federal Rules of Appellate Procedure were adopted in 1967 after the civil rights attorney's fees provisions were enacted in the Civil Rights Act of 1964. Yet both courts which considered the question rejected the argument summarily, holding that the word "costs" as used in the Rules is limited to the traditional definition.

Finally, when the authors of the Federal Rules intended that attorney's fees be recoverable, they were specifically mentioned, as in Rule 37 of the Federal Rules of Civil Procedure which allows "reasonable expenses...including attorney's fees" (emphasis added) as discovery sanctions. Since Rule 68 does not also explicitly include attorney's fees, they simply are not allowable thereunder as a part of defense costs.

II. The Civil Rights Fee-Shifting Statutes Did Not Amend the Meaning of "Costs" in Rule 68

Since Rule 68's reference to costs literally does not include attorney's fees, any argument that such costs do include or affect attorney's fees must turn on the proposition that Congress' enactment of fee-shifting legislation amended Rule 68 sub silentio when it made attorney's fees recoverable "as part of the costs." See, e.g., Waters v. Heublein, Inc., 485 F.Supp. 110, 114 (N.D. Cal. 1979), where the trial court held that a Rule 68 offer, which turned out to be more than the plaintiff ultimately recovered, precluded an award of attorney's fees to the prevailing plaintiff for all time expended by plaintiff's lawyers after the date of the offer.

The problem with this argument is that the identical argument was rejected, with

regard to 28 U.S.C. §1927, by this Court in Roadway Express, Inc. v. Piper, 48 U.S.L.W. 4836 (U.S. June 23, 1980). It also should be rejected here, with regard to Rule 68, for three reasons.

A. There is no evidence of any congressional intent to alter the meaning of costs in Rule 68

Nothing in the fee-shifting statutes or their legislative history suggests that Congress intended to amend Rule 68 by incorporating attorney's fees into costs. Recognition of this fact flows directly from the examination made in the decision by this Court in Roadway Express, Inc. v. Piper, supra.

It of course remains true that fee-shifting provisions such as those in 42 U.S.C. §1988 and in Title VII do authorize fee awards as a part of the costs. But,

as this Court found in Roadway Express, Inc. v. Piper, supra, the manner in which Congress chose to authorize fees is irrelevant here. This is so because, as the Fifth Circuit recently concluded after examining the extensive legislative history of 42 U.S.C. §1988, fees were authorized as part of costs "for one reason and one reason only: to ensure that the Eleventh Amendment is no bar so that these fees are recoverable against government officials acting in their official capacity." Gates v. Collier, 616 F.2d 1268, 1276 (5th Cir. 1980). See also, Hutto v. Finney, 437 U.S. 678, 695 (1978).

Congress of course at any time could amend the list of taxable costs specified in 28 U.S.C. §1920. In fact, Congress recently did amend the §1920 definition of taxable costs to include fees of court-appointed interpreters and expert witnesses when it passed the Court Interpreters Act,

Pub.L. No. 95-939, codified primarily in 28 U.S.C. §§1827-1828. Congress did not similarly amend §1920 to include attorney's fees, nor has it done so in enacting the civil rights fee-shifting statues. In other words, Congress has never yet used the civil rights fee-shifting statutes to affect the ordinary meaning of costs.

B. Even though attorney's fees are generally authorized "as part of the costs," they are treated as distinct from ordinary costs for most substantive purposes

As a practical matter, attorney's fees under all fee-shifting statutes are not treated as costs for most other purposes. The standards for taxing costs and for awarding attorney's fees are quite different. Under Rule 54(d), costs are allowed "as of course to the prevailing party," whether

plaintiff or defendant. Under civil rights fee-shifting statutes, on the other hand, fees are ordinarily awarded to prevailing plaintiffs "unless special circumstances would render such an award unjust," Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968), but to prevailing defendants only where the plaintiffs' action was brought in bad faith or is "found to be unreasonable, frivolous, meritless or vexatious." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978). Thus, particularly with regard to prevailing defendants, the standards for taxing costs are quite different from the standards for awarding fees.

Additionally, the method for taxing costs differs considerably from the complications involved in determining a reasonable award of fees. Under Rule 54(d), costs may be taxed by the clerk of court on one days'

notice. Attorney's fees, however, can be awarded only by a "court." See, e.g., 42 U.S.C. §1988; Robinson v. Kimbrough, 620 F.2d 468, 473 (5th Cir. 1980). And, in determining the amount of fees, courts must consider an intricate set of standards before making the award. See, e.g., Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (1974), which sets forth 12 factors to be considered in setting reasonable fees; see also, Lindsay Brothers Builders, Inc., v American Radiator & Standard Sanitary Corp. 540 F.2d 103 (3d Cir. 1976), which explains the various factors to be considered under the lodestar method of fee computation.

Both the dual standard for awarding fees and the methodology to be used by the courts to calculate reasonable fee awards form a considerable part of the legislative history of 42 U.S.C. §1988. See particularly, S.Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess.,

8-9 (1976). Quite evidently, Congress did not intend fees to be treated as akin to costs.

C. Allowing Rule 68 offers to affect attorney's fees would substantially undermine the congressional purpose behind both Rule 68 and the civil rights fee-shifting statute

Rule 68 was intended to provide a modest incentive to settle litigation by making a plaintiff who refused a reasonable offer and who thereafter recovered less than the offer to bear the costs incurred by both parties after the date of the offer. These costs, limited to the accepted notions of taxable costs, are normally small compared to the total expense of litigation. Traditionally, recoverable costs have included clerk's and marshal's fees, costs of necessary transcripts and printing, witness fees, docket

fees, and the like. 28 U.S.C. §1920. Not included are attorney's fees. Yet, even with fees being treated quite separate from costs, taxable costs are sufficiently substantial to the extent that shifting them can provide a strong incentive for accepting reasonable Rule 68 offers.

The attorney's fees awarded in civil rights litigation, similar to yet ordinarily less than the fee awards in securities and antitrust litigation, are altogether different from costs. Not only are fee awards considerably larger than the taxable costs allowable,[4/] but the purposes of fee awards are altogether different from those of Rule 68 cost-shifting.

4/ This fact is derived in part from the congressional intent that counsel be adequately compensated for all time reasonably expended on a matter, and that the award not be reduced because the rights involved may be nonpecuniary in nature, S. Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976).

As this Court has repeatedly recognized, attorney's fees are awarded in civil rights cases to vindicate "a policy that Congress considered of the highest priority." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). Private plaintiffs are Congress' chosen instrument to enforce many of the nation's civil rights laws. In enacting these statutes, Congress has repeatedly stressed the importance of "private attorneys general," and the necessity of attorney's fees so that plaintiffs--whatever their means--are not deterred from securing their statutory and constitutional civil rights. See generally, S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976).

The importance of the civil rights fee-shifting statutes is highlighted by the interpretation they have received from this Court. Although the statutes usually declare that

"the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee," it has been held that, to effectuate Congress' aims, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 390, 402 (1968)(emphasis added). Lower courts have interpreted this to mean that fees should be awarded to prevailing plaintiff's "as a matter of course." See, e.g., Gates v. Collier, 616 F.2d 1268, 1275 (5th Cir. 1980), and cases cited therein. Moreover, a plaintiff need not win on every issue to be a "prevailing" party, and there need not be a final judgment. See, e.g., Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979); Brown v. Culpepper, 559 F.2d 275 (5th Cir. 1977).

"The full effectuation of the nation's civil rights policy would be seriously undermined if congressionally authorized fees

could be held hostage to Rule 68 offers. This concern was one basis for the Seventh Circuit's holding below that there is a good faith requirement in Rule 68. But the court below erred in assuming that the defendant's attorney's fees might have been shifted by the Rule 68 offer.

If potential plaintiffs--particularly their attorneys--know they may be unable to recover fees, even though the plaintiffs ultimately may become the prevailing parties, they no doubt will pursue their rights less often, if at all. Yet, in enacting the Civil Rights Attorney's Fees Awards Act in 1976, 42 U.S.C. 1988, Congress recognized that earlier fee shifting provisions had been successful in enabling "vigorous enforcement of modern civil rights legislation." S. Rep. No. 94-1011, 94th Cong., 2d Sess., 4 (1976) (emphasis added). The purpose of 42 U.S.C. §1988 is the same. It is designed to extend

that "vigorous enforcement" to civil rights statutes which did not have their own fee-shifting provisions. This Court should not allow this policy of vigorous enforcement to be undermined by making attorney's fees taxable as Rule 68 costs.

CONCLUSION

Amicus agrees with respondent's reasoned argument that Rule 68 applies only where an offeree wins something that is less than the offeror's offer; and that, even there, Rule 68 cannot be invoked unless the offer is reasonable. Accordingly, amicus urges affirmance of the decision below.

Amicus also submits, however, that the word "costs" in Rule 68 does not and cannot include attorney's fees. For the foregoing reasons, amicus requests this Court to

recognize that Rule 68 has no effect on fee awards or on the standards designed by Congress for civil rights fee-shifting statutes.

Dated: September 15, 1980
New York, New York

Respectfully submitted,

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* Counsel wish to thank Jonathan Klein, a law student at the University of Michigan Law School, for his assistance on this brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS AMICUS CURIAE

INTEREST OF THE AMICUS

The National Association for the Advancement of Colored People (NAACP) is a non-profit membership association representing the interest of approximately 500,000 members in 1800 branches throughout the United States. Since 1909, the NAACP has sought through the courts, the legislative and the executive branches of

government to establish and protect the civil rights of minority citizens. In these efforts, the NAACP has often appeared before this Court as an amicus in cases involving voting rights, jury selection, capital punishment, school desegregation, employment discrimination and other cases involving individual rights protected by the Constitution of the United States, and in cases protecting the vitality of the Bill of Rights.

The case at bar is of particular interest to the NAACP. It involves the review of a judgment which, if reversed, will in all likelihood put Title VII plaintiffs in a financially precarious position if they should believe sufficiently in their case to pursue it to judgment. It would indirectly deny to the district courts of this country the discretion to implement the purposes of Title VII. The Congress has sought the assistance of private litigants to come into the federal courts to pursue their right to employment without discrimination on the basis of race, religion, sex or national origin recognizing that government resources alone cannot turn the tide of discrimination in employment.

The importance of this case is that reversal would place a club in the hand of employers which could bring financial ruin to plaintiffs who bring Title VII actions. It would be particularly unfortunate for those litigants who are without resources and for whom the district court has appointed counsel and allowed them to proceed without payment of fees, costs or security as provided by Title VII. Such was never intended by the Congress of the United States.

CONSENT OF THE PARTIES

With the consent of both parties pursuant to Rule 42 of the Supreme Court Rules, Amicus respectfully submits this brief in support of Respondent, Rosemary August. The consents are included in the Appendix to this Brief.

SUMMARY OF ARGUMENT

This Court does not have the power to abridge substantive rights in the guise of enacting Rules of Procedure. Acceptance of defendant's arguments would place this Court in such a posture. The Congress enacted substantive legislation to eradicate discrimination in employment, and encouraged the penurious complainant to seek redress by providing judicial discretion to appoint counsel, waive fees, and award attorneys fees and costs. The application of Rule 68 to Title VII cases would abridge that judicial discretion, place complainant's counsel on the horns of a dilemma, and frustrate the purposes of Title VII. Furthermore, even if Rule 68 applies, defendant's offer of judgment failed to meet the plaintiff's demand for relief, thus, it did not satisfy Rule 68.

ARGUMENT

I.

COURTS ARE WITHOUT THE POWER TO BURDEN SUBSTANTIVE RIGHTS GRANTED BY CONGRESS.

The Congress, in its wisdom, addressed the vast problems of discrimination in this country by enacting the 1964 Civil Rights Act. It provided for the elimination of discrimination in public accommodations and facilities, education, employment and in the use of federal funds in any area. In addressing the problems of discrimination in employment, it enacted "a complex legislative design directed at a (sic) historic evil of national proportions." *Albemarle Paper Company v. Moody*, 422 U.S. 405, 416, 95 S.Ct. 2362, 2371 (1975). The purpose of this design "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identified group of white employees over other employees". *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430, 91 S.Ct. 849, 853 (1971).

This Court recognized that the Congress knew that the federal government, alone, could not enforce the Civil Rights Law and observed in *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401, 88 S.Ct. 964, 966 (1968):

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . .

In drafting Title VII, the Congress included two provisions to encourage private enforcement of the Act. Section 706(f)(1) provided:

> . . . the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. . . .

This provision was clearly directed to encourage the complainant of limited means to take his claim of discrimination to court in the event he was not satisfied by the outcome of his claim at the Equal Employment Opportunity Commission. It did not distinguish between the complainant whose charge was found to have merit by the Equal Employment Opportunity Commission and the complainant whose charge was found to be lacking in merit. The Congress rightfully recognized that there could be substantial differences of opinion between clerks in an administrative agency and the judges who have been appointed by the President and whose qualifications have been examined by the Senate of the United States. Experience has demonstrated that the penurious claimant whose claim is found to be without merit by the Equal Employment Opportunity Commission does prevail from time to time in the district court. That sort of complainant must be protected.

The Congress also provided in Section 706(k):

> In any action or proceeding under this title [42 U.S.C. § 2000e, *et seq.*] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

This section gave the district court the discretion to determine how costs should be borne by the parties.

The common law in the usual case made no provision for costs of litigation. In the United States, legislation has provided for distribution of the cost of litigation. Ex-

cept for very limited circumstances, attorneys fees have, generally, been the burden of each party to the litigation to the extent that each litigant incurs the services of lawyers. This Court examined this "American Rule" and after an extensive review of the English system and American legislation over the years, determined that the Rule still applies unless a legislature enacted legislation to provide for the award of costs. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975). The *Alyeska* case makes it crystal clear that there is no right to attorney fees and costs except that the right is established by statute.

The Congress has stated its policy in section 706(k) that in Title VII litigation, the district court has discretion to award costs to a prevailing party. Interestingly, Title VII does not require that a particular party is to have costs awarded. Apparently, the Congress was willing to rely on the courts to establish, by "Judicial Rule", a method of determining who was entitled to costs as a matter of sound judicial discretion. We suggest that this Court's examination of Title VII, particularly section 706(k), has set out reasonable guidelines for determining what is informed judicial discretion and when costs and fees should be imposed. In this connection we particularly invite the Court's attention to its decision in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 417-424, 98 S.Ct. 694, 698-701 (1978). It is clear, from the Court's examination of the legislative history of Title VII and the decision in that case, that the complainant who lost, was to be further "punished" only if his action was found to be unreasonable, frivolous, meritless or vexatious. While the *Christiansburg Garment* case addressed itself only to the question of attorneys fees for a prevailing defendant, we suggest that the principles announced by the courts

in that case is entirely consistent with the remedial nature of the Civil Rights Act of 1964. The *Christiansburg Garment* case was not an isolated case or an aberration. This Court in *Albemarle Paper Company v. Moody*, 422 U.S. 405, 415, 95 S.Ct. 2362, 2370 (1975), decided a little over a month after *Alyeska*, commented on section 706(k):

> The Court held there (*Newman v. Piggie Park Enterprises*, 390 U.S. 400, 88 S.Ct. 964), that attorneys fees should "ordinarily" be awarded—i.e., in all but "special circumstances"—to plaintiffs successful in obtaining injunctions against discrimination in public accommodations, under Title II of the Civil Rights Act of 1964. While the Act appears to leave Title II fee awards to the district court's discretion, 42 U.S.C. § 2000a-3(b), the court determined that the great public interest in having injunctive action brought could be vindicated only if successful plaintiffs, acting as "private attorneys general", were awarded attorneys fees in all but very unusual circumstances. There is, of course, an equally strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices. But this interest can be vindicated by applying the *Piggie Park* standard to the *attorneys' fees* provision of Title VII, 42 U.S.C. § 2000e-5(k), see *Northcross v. Memphis Board of Education*, 412 U.S. 427, 428, 93 S.Ct. 2201, 2202, 37 L.Ed.2d 48 (1973). . . .

The scheme devised by Congress to deal with the problem of discrimination in employment, has been approved by this Court in numerous cases. The court's discretion to appoint counsel and allow filings without fee, coupled with its discretion to award attorneys fees and costs to a prevailing party is an integral part of the rights afforded complainants who seek a remedy for discrimination in employment which violates Title VII of the Civil Rights Act of 1964 as amended. In considering

the arguments here raised in support of the Seventh Circuit Court of Appeals result, we respectfully suggest that this Court should be mindful of its decision in *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 158 (1937), in which the Court stated that:

> In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208, 41 S.Ct. 451, 65 L.Ed. 892; *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 44 S.Ct. 560, 68 L.Ed. 1087; *United States v. Holt State Bank*, 270 U.S. 49, 56, 46 S.Ct. 197, 199, 70 L.Ed. 465; *Langnes v. Green*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520; *Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U.S. 237, 239, 55 S.Ct. 746, 79 L.Ed. 1414; *cf. United States v. Williams*, 278 U.S. 225, 49 S.Ct. 97, 73 L.Ed. 314.

We recognize that there is nothing in the Civil Rights Act of 1964, as amended which would prohibit the application of the Federal Rules of Civil Procedure in their entirety to Title VII litigation. However, the purposes of the Act should not be ignored when the Court examines that question. It is clear that the application of Rule 68, Federal Rules of Civil Procedure, can frustrate the policies underlying the Act which were promoted by the Congress of the United States. Indeed, applying Rule 68 in Title VII cases places an unconscionable burden on lawyers who represent complainants of discrimination in employment. On the one hand, pursuant to Rule 11 of the Federal Rules of Civil Procedure, the attorney represents to the court that he believes the client's case has merit. It may well be that he is wrong. There is further imposed upon counsel for the complainant the burden of determining and advising the complainant whether he should go forward on his case when an offer

is made pursuant to Rule 68, knowing that if he is wrong, he may well destroy any chance of that complainant being able to support himself and his family even if he is gainfully employed. We can only assume that defendants act in good faith and only do those things which it believes to be necessary to prepare itself to defend a serious charge which has been brought against it. In the large enterprise such preparation may entail deposing numerous people who are all mentioned by the complainant as being persons who have knowledge of the conduct about which the complainant complains. In today's world, the minimum expense may be several thousands of dollars. This Court's observation in *Christiansburg Garment Co. v. E.E.O.C., supra*, 98 S.Ct. at 700 is apt when considering the lawyer's dilemma.

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. *This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. . . . The law may change or clarify in the midst of litigation.* (emphasis supplied)

We suggest that the whole of Title VII of the Civil Rights Act of 1964 as amended, establishes a substantive right which the Congress, under the Constitution, had a right to do. It is incongruous that the Congress would establish a substantive right, invite the penurious complainants into the courts, and then intend for them to be saddled with large ungainly debt for costs in the event that they are unable to establish, to the court's satisfaction, that in fact, the complainant was discriminated against in employment. We suggest that it was not the intent of Congress to expose people to the possibility of

bankruptcy in enacting this legislation. We further suggest that it was not the intention of Congress to grant this Court or any district court the authority to in any manner modify any substantive right determined by the Congress. In 28 U.S.C. § 2072, the Congress, in authorizing this Court to promulgate Rules of Civil Procedure, specifically provides that "such rules shall not abridge, enlarge or modify any substantive right. . . ." The Rules of Civil Procedure are, rules for the court to carry on its business in an orderly fashion, in effect, housekeeping rules. No authority was intended or granted for the Rules of this Court to be applied to substantive legislation to destroy the effect of the substantive rights granted by Congress. This Court in *Hanna v. Plumer*, 380 U.S. 460, 464, 85 S.Ct. 1136, 1140 (1965), quoted from *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14, 61 S.Ct. 422, 426 (1941), when it was asked to determine whether a federal rule applied.

> The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.

This Court has recognized, more than once, the substantive rights provided for in Title VII of the Civil Rights Act of 1964 as amended. We suggest that the case at bar demonstrates the real possibility of Rule 68 placing such a burden on the decision to seek redress for employment discrimination, that the rule would discourage actions which Congress has determined should be encouraged. This is a burden, on the substantive right, of such magnitude as to abridge or modify the right, which the Congress has specifically prohibited. We suggest that this Court's determination should be that Rule 68 may not constitutionally be applied to Title VII litigation.

II.

DEFENDANT'S OFFER OF JUDGMENT UNDER RULE 68 DID NOT MEET PLAINTIFF'S DEMAND FOR RELIEF.

Amicus have argued that Rule 68 does not apply to Title VII cases. However, if this Court should determine that it does, defendant has not met the requirements of the Rule with its offer of judgment of "$450.00 which shall include attorney's fees, together with costs accrued to this date." (Jt. App. pp. 33-34). Plaintiff in her complaint sought reinstatement, back pay, benefits, other equitable relief, and attorneys fees and costs all pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The offer and the prayer do not meet.

The relief contemplated in Title VII is of an equitable nature. As stated by this Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372 (1975) in discussing whether the court could award back pay.

> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secur[e] complete justice." (citations omitted). . . . Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965).

Defendant's offer of judgment makes not the slightest attempt to meet the demand for equitable relief outlined in plaintiff's prayer. It merely addresses a damage award and attorney fees and costs. It does not address

reinstatement, back pay, benefits or injunctive relief of any sort. For an offer of judgment to be sufficient to trigger the application of Rule 68, it must reasonably encompass the relief prayed for. 7 Moore's Federal Practice, § 68.04 pp. 68-69 (1975).

Case law on Rule 68 is sparse. In *Scheriff v. Beck*, 452 F.Supp. 1254 (Colo. 1978), a civil rights case arising under 42 U.S.C. §§ 1983 and 1988, defendant made an offer of judgment excluding attorney fees. The district court held the offer did not satisfy Rule 68 because it did not include "costs then accrued" which in civil rights cases includes attorneys fees. In *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974) a patent infringement case, the offer was $25.00 and notice that defendant would cease the alleged infringement. The court held that that offer was valid. Neither case, nor others, definitively set out what sort of offer satisfies Rule 68.

The language in Rule 68 states that the offer must be to "allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued." For a plaintiff to understand the offer and to be clear that defendant is addressing all relief claimed by plaintiff, especially in a Title VII case where relief is not confined, the defendant must address all possibilities with specificity. Here defendant mentions money only and costs and attorney fees. Does this money include a possible back pay award? Nowhere does defendant mention the other benefits which were attendant to plaintiff's employment. Nowhere does defendant mention reinstatement. Nowhere does defendant mention that it would not discriminate in the future. The offer of judgment is in the nature of an offer

to settle the litigation and all relief aspects should be expressly included or excluded so that plaintiff knows what he is refusing. The apparently discretionless consequences under Rule 68 mandates that the offer of judgment be precise and complete.

CONCLUSION

This Court should determine that Rule 68 does not apply to Title VII as to do so would abridge substantive rights given under Title VII and would exceed the Court's authority to promulgate rules for uniform court procedure. In the alternative, the Court should find that defendant's offer does not meet plaintiff's demand for relief.

Respectfully submitted,

ALDUS S. MITCHELL
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(312) 346-6789

APPENDIX

ROSEMARY AUGUST, hereby consents to the National Association for the Advancement of Colored People filing an Amicus brief on behalf of Rosemary August in the matter entitled:

Delta Airlines, Inc.

vs.

Rosemary August
No. 79-814
United States Supreme Court

ROSEMARY AUGUST

BY /s/ SUSAN MARGARET VANCE

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28 July 1980

Aldus S. Mitchell, Esq.
Mitchell, Hall, Jones & Black, P. C.
134 South LaSalle Street
Suite 700
Chicago, Illinois 60603

Re: Delta Air Lines, Inc. v. August
No. 79-814

Dear Mr. Mitchell:

Thank you for your letter of July 22, 1980 to Allan Kovar.

The Petitioner, Delta Air Lines has no objection to your filing of a brief in the above-captioned matter as an amicus curiae, pursuant to the Rules of the Supreme Court.

Very truly yours,

/s/ BURR E. ANDERSON

BEA:ef

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-814

DELTA AIR LINES, INC., PETITIONER

v.

ROSEMARY AUGUST

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether Rule 68 of the Federal Rules of Civil Procedure mandates assessment of costs against a plaintiff in a Title VII case in which (a) the defendant's offer of judgment, rejected by the offeree, placed an arbitrary limit on the amount the court could award as accrued costs including attorneys' fees, (b) the offeree did not "finally obtain" a judgment against which the offer could be compared, and (c) the offer was not a reasonable one with a chance of inducing settlement.

2. Whether the district court abused its discretion under Rule 54(d) by ordering both parties to bear their own costs.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. A2-A7)[1] is reported at 600 F.2d 699. A companion opinion (J.A. A15-A18) and the opinions of the district court (J.A. A8-A13, A19-A32) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1979. A petition for rehearing was denied August 28, 1979 (J.A. A1). The petition for a writ of certiorari was filed on November 23, 1979, and was granted on April 21, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES AND STATUTE INVOLVED

Rule 1, Fed.R.Civ.P., provides:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 54(d), Fed.R.Civ.P., provides:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within

[1] "J.A." refers to the joint appendix to the briefs.

5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 68, Fed.R.Civ.P., provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Section 706(k), Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF INTEREST

Many federal statutes such as the one involved in this litigation, Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, depend on private litigants, playing the role of "private attorneys-general," for their effective enforcement. See, *e.g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The United States and the Equal Employment Opportunity Commission (which administers federal fair employment statutes, including Title VII) believe that petitioner's arguments, if accepted, could lead to misuse of the Federal Rules of Civil Procedure and undermine enforcement of such federal statutes. This is so because claimants under Title VII and similar statutes who have nonfrivolous claims might be deterred from pursuing those claims in the courts if a token offer, made early in the litigation by a defendant and reasonably rejected by a plaintiff, were considered sufficient to mandate the assessment of the defendant's post-offer costs against a plaintiff who ultimately failed to recover on his or her claim. Under Rule 54(d), which would govern if Rule 68 did not apply, such a claimant would at least be assured that in such circumstances the district court could exercise its discretion to direct that each party bear its own costs if this were the more just result. A construction of Rule 68 that would encourage token offers and, accordingly, discourage offers that might reasonably induce settlement, would also undermine the congressional policy of encouraging voluntary resolutions of Title VII disputes.

STATEMENT

Following a determination by the EEOC that there was reasonable cause to believe that petitioner Delta Airlines, Inc., discharged respondent Rosemary August because of her race, respondent brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, asking for reinstatement, backpay, and attorneys' fees (J.A. A2-A3, A15, A19).[2]

On May 12, 1977, petitioner submitted the following offer of judgment to respondent's counsel (J.A. A34):

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450, which shall include attorneys' fees, together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damage.

The offer was not accepted. The docket sheets reveal that in addition to filing a complaint, respondent's counsel had, by May 12, 1977, participated in this action by attending respondent's deposition, preparing a set of interrogatories, and being present at a status call.[3]

[2]The complaint also sought damages under a pendent state claim for defamation (J.A. A19). Summary judgment was entered for petitioner on that claim without opposition by respondent (J.A. A20).

[3]We have been informed by respondent's counsel that she had spent 39 hours on this case by May 12, 1977, and that her billing rate is $50 per hour. At the time of petitioner's offer, therefore, respondent's attorneys' fees could have been as much as $1,950.

The matter proceeded to trial. At the close of respondent's case, petitioner moved for dismissal under Fed. R. Civ. P. 41(b). The district court denied the motion at the close of the trial but entered judgment against respondent (J.A. A32). The court found that respondent had demonstrated that in a number of instances "stern measures were taken against Negroes in general and [respondent] Rosemary August in particular, while a more tolerant attitude was displayed toward Caucasians" and that "the benefit of any doubt was shown a Caucasian flight attendant but not a Negro." Nevertheless, the court found that petitioner had demonstrated that "in equal numbers of cases, it was the Negro that benefited * * *" (J.A. A31). The court concluded (J.A. A32) that although "[f]rom the evidence presented, it would appear that Delta Air Lines, Inc. may not be the most pleasant place to work[,]" the record "does not establish that its employment practices are racially premised" or that respondent had been subject to disparate treatment because she was black.

In entering judgment for petitioner, the district court, without elaboration, ordered each side to "bear its own costs of litigation" (*ibid.*).

Ten days after entry of judgment, petitioner served a motion for reassessment of costs under Rule 68. The district court denied the motion. At the hearing on the motion, the court explained (J.A. All):

> [A] Rule 68 offer must be made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable.
>
> * * * * *
>
> If the purpose of the rule is to encourage settlement, it is impossible for this Court to concede

> that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.

The court found the $450 offer not to be arguably reasonable (J.A. A12):

> At the time this offer of $450 was made this litigation was approximately four months old. While the offer was intended to be received in full settlement of the parties' dispute, it is unlikely that such a small sum of money would even have fully satisfied the plaintiff's then incurred costs in attorneys' fees.

The court noted (*ibid.*) that it had not found the claim to have been frivolous.

The court of appeals affirmed the judgment. As to the merits of the action, the court of appeals held that the judgment was not clearly erroneous and had been supported by substantial evidence (J.A. A15–A18). In a separate opinion concerning the district court's denial of costs under Rule 68, the court of appeals rejected a "technical" reading of that rule under which a trial court would be required to impose costs on a nonprevailing plaintiff even when the rejected offer had been clearly unreasonable. The court observed (J.A. A5) that such a construction of the rule would undermine its purpose of encouraging settlements, since "a minimal Rule 68 offer made in bad faith could become a routine practice of defendants seeking cheap insurance against costs." The court further explained (J.A. A6) that in its application to Title VII cases, such a construction of the rule would work against the congressional policy of encouraging "aggrieved individuals to seek redress for violations of their civil rights." Accordingly, without deciding whether its interpretation of the rule should apply "in other kinds of cases," the court held (*id.* at A7):

> In Title VII cases, the trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case.

SUMMARY OF ARGUMENT

1. In cases to which it applies, Rule 68 of the Federal Rules of Civil Procedure mandates the assessment of post-offer costs against an offeree who has rejected an offer of judgment. But Rule 68 does not apply (1) where the offer arbitrarily limits the amount of "costs then accrued" to be paid by the offeror, (2) where the offeree does not "finally obtain[]" a judgment, and (3) where the offer is a mere token with no likelihood of inducing a settlement. These three independent grounds supporting the judgment below have special force in Title VII suits.

a. The plain language of Rule 68 requires that an offer include "costs then accrued." In Title VII cases in which a plaintiff obtains relief, whether through litigation or through settlement, the plaintiff's costs ordinarily include attorney's fees. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978). Petitioner's offer of "$450 which shall include attorney's fees, together with costs accrued to date" would not permit entry of a judgment allowing taxation of all accrued costs deemed proper by the court. No such limitation is provided for in the rule, and the rule therefore may not be invoked to mandate an assessment of post-offer costs against respondent here.

b. The plain language of Rule 68 also makes it applicable only in cases in which a "judgment finally obtained by the offeree is not more favorable than the offer." The underlying assumption—that the rule applies only in cases in which the offeree obtains some relief—reflects the operation of state offer-of-judgment provisions from which Rule 68 was derived. Other provisions of state codes mandated an assessment of costs in favor of the prevailing party in many actions, including most suits at law. The offer-of-judgment provisions made it possible for courts to deny costs to a prevailing plaintiff who had rejected a reasonable offer of judgment and thereby needlessly prolonged the litigation. The same result was achieved in actions in equity through the courts' exercise of discretion over cost awards.

c. The language of opinions in state cases applying state offer-of-judgment provisions and in federal cases applying Rule 68 reflects an assumption that only reasonable offers—those that might induce a reasonable offeree under the circumstances to settle the case—properly trigger cost-shifting provisions. A construction of Rule 68 that permits a token offer to trigger a shifting of costs in the event the offeree rejects it and ultimately recovers less would undermine the recognized purpose of Rule 68 "to induce settlement" and thereby "avoid protracted litigation." Defendants would be encouraged, instead, to make a nominal offer at the earliest stage of the litigation, gambling on the chance that the plaintiff would recover nothing and that the court would then be deprived of its discretion under Rule 54(d) not to award costs against the nonprevailing plaintiff where justice in the particular circumstances of the case dictates some other result.

Where a nonprevailing plaintiff is shown to have rejected a reasonable settlement offer, however, it might well be an abuse of the court's discretion under Rule 54(d) to direct that the prevailing defendant not recover its costs. Indeed, since a prevailing party may recover all of its costs under Rule 54(d)—not just post-offer costs as under Rule 68—a more just result can be obtained under Rule 54(d) in cases in which the offeree obtains no judgment.

d. The construction of Rule 68 of the Federal Rules of Civil Procedure that we urge is the one most consistent with the rule's purposes and with other relevant provisions: Rule 1, which requires that the rules be construed in the way most likely to achieve a "just, speedy, and inexpensive determination of every action"; Rule 54(d), which combines traditional rules for cost assessment in suits at law and actions in equity in a manner that the drafters thought would guarantee the best results; and Title VII of the Civil Rights Act of 1964, which depends on private attorneys general for its enforcement and thus would be undermined by any construction of judicial rules that would threaten large cost awards against plaintiffs with nonfrivolous but unsuccessful claims, even where, in the circumstances of the case, such awards are unwarranted.

2. Because Rule 68 was held inapplicable in this case, costs were determined under Rule 54(d). The trial court, which was in the best position to weigh the equities of the case, properly exercised its discretion in directing that each party bear its own costs. Its order was proper because respondent's claim was not frivolous, she had rejected no reasonable settlement offer, she is an unemployed airline stewardess for whom even her own costs of litigation represent a con-

siderable burden, and petitioner is clearly able to absorb its own costs.

ARGUMENT

I. RULE 68 OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT MANDATE ASSESSMENT OF COSTS AGAINST A TITLE VII PLAINTIFF WHERE THE DEFENDANT'S OFFER OF JUDGMENT HAS PLACED AN ARBITRARY LIMIT ON THE AMOUNT THE COURT MAY AWARD AS ACCRUED COSTS, INCLUDING ATTORNEYS' FEES, THE OFFEREE HAS NOT OBTAINED A JUDGMENT WITH WHICH THE OFFER MAY BE COMPARED, AND THE OFFER IS NOT A REASONABLE ONE WITH A CHANCE OF INDUCING SETTLEMENT

The ruling of the courts below that Rule 68 does not mandate the assessment of costs against the respondent in this case is supported by three grounds, each an independent basis for the judgment. Although independent, all three grounds relate to the basic purposes of the rule: "to encourage settlements" and thereby "avoid protracted litigation" (*Advisory Committee Report on Proposed Amendments to the Rules of Civil Procedure*, 5 F.R.D. 433, 483 (1946))[4] and "to protect the party who is willing to settle from the bur-

[4] Although this statement of purpose was not included in the notes on the rule as promulgated in 1938, it has been repeatedly cited by courts and commentators. See, *e.g.*, 7 *Moore's Federal Practice* ¶ 68.02 at 68-4 (1979); 12 C. Wright & A. Miller, *Federal Practice and Procedure* § 3001 at 56 (1973); *Gay* v. *Waiters' and Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500, 502, 22 Fair Empl. Prac. Cas. 1249, 1250 (N.D. Cal. 1980); *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 610 (E.D.N.Y. 1974); *Maguire* v. *Federal Crop Insurance Corp.*, 9 F.R.D. 240, 242 (W.D. La. 1949).

The Advisory Committee Note to Rule 68 as first promulgated, gave no explanation for the rule. It stated in full: "See 2

den of costs which subsequently accrue." *Staffend* v. *Lake Central Airlines, Inc.*, 47 F.R.D. 218, 219 (N.D. Ohio 1969).

First, the judgment was proper because the offer did not include all costs accrued at the time it was made and therefore did not comply with the express terms of Rule 68. Second, the language, the history, and the purpose of the rule indicate that it applies only in cases—unlike this one—in which a plaintiff or other claimant party has recovered a judgment granting some relief but the relief obtained is less favorable than that offered by the defending party. Third, the history and purpose of the rule suggest that a token offer that could not have induced any reasonable person to settle the case at that phase of the suit does not come within the rule. Although these arguments have potentially broader application, we believe they have special force in Title VII suits.

We do not disagree with petitioner's contention (Pet. Br. 10-11) that Rule 68 is "mandatory" with respect to the assessment of costs, *i.e.*, that costs "must" be assessed against an offeree who has rejected an offer to which the rule applies and who has "finally obtained" a judgment less favorable than the offer. We argue only that in this case Rule 68 does not apply.

A. The Offer Did Not Include All Accrued Costs and Thus Did Not Comply with the Rule

A valid Rule 68 offer necessarily consists of two components: (1) relief, in the sense of "money or property" or terms having some specified "effect" on the

Minn. Stat. (Mason, 1927) § 9323; 4 Mont.Rev.Codes Ann. (1935) § 9770; NY CPA (1937) § 177." 7 *Moore's Federal Practice* ¶ 68.01[2] (3d ed. 1979). See discussion, *infra*, pages 16-18).

matter in controversy, and (2) taxable "costs then accrued." While the rule permits the offeror to determine the nature of the relief offered (on the implicit conditions explained *infra*, pages 15–26), it permits him no flexibility as to costs. If the offer is accepted, the offeror must pay whatever costs the court determines were taxable at the time the offer was extended. "Rule 68 does not permit an offeror to choose which accrued costs he is willing to pay." *Scheriff* v. *Beck*, 452 F. Supp. 1254, 1260 (D. Colo. 1978). An offer that either omits costs or that sets a limit on the amount of costs the district court may determine clearly does not comply with the rule. *Ibid.*; *Johnny Carson Apparel, Inc.* v. *Zeeman Mfg. Co.*, 203 U.S.P.Q. (BNA) 585, 596 (N.D.Ga. 1978). See also *Conolly* v. *S.S. Karina II*, 302 F. Supp. 675, 683 (E.D.N.Y. 1969). Thus, offers for "$450 together with half the costs then accrued," for "$450, which shall include expenses for trial transcripts, together with costs then accrued," or simply for "$450" would not satisfy the terms of the rule.

The requirement that the offer contain an unequivocal agreement to reimburse all "costs then accrued," as subsequently determined by the court, is both stated in the rule's plain language and consistent with the rule's purpose "to encourage settlement." Without mandatory reimbursement of accrued costs, the offeree will have little incentive to settle, especially if costs are substantial or they encroach on the relief offered. By forcing the offeror to agree to pay whatever costs will be taxed by the court, the requirement also discourages, although it does not prevent, sham offers made solely to invoke the cost-shifting provision of the rule and not to settle disputes.

Neither Rule 68 nor Rule 54(d), the general cost assessment provision, provides a definition of costs. Hence resort to relevant statutory provisions is necessary in order to determine what items are included. It follows that when the action is one based on a statute that requires a court to award attorneys' fees as part of costs, an offer fails to comply with Rule 68 if it offers to pay less than all "costs then accrued," including whatever a court subsequently determines to be reasonable attorneys' fees. See *Scheriff* v. *Beck*, *supra*, 452 F. Supp. at 1260 (in civil rights action, offer of "$10.00 inclusive of costs, interest, and attorneys' fees" was "fatally defective because it excludes attorney's fees then accrued"). See also *Perkins* v. *New Orleans Athletic Club*, 429 F. Supp. 661, 667 (E.D. La. 1976).[5]

Under the attorneys' fees provision of Title VII of the Civil Rights Act of 1964, Section 706(k), 42 U.S.C. 2000e-5(k), such fees are awarded "as part of the costs."[6] Moreover, the award of fees to prevailing plaintiffs is virtually mandatory: "a prevailing Title

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[5] As a corollary to the inclusion of attorneys' fees as a mandatory component of costs, the offeree who rejects an offer that conforms to Rule 68 requirements risks not recovering attorneys' fees, because the judgment may be less favorable than the offer and the offeree will thereby forfeit any right to costs, including attorneys' fees, that he or she would otherwise enjoy as the prevailing party. See *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110 (N.D. Cal. 1979).

[6] In *Roadway Express Inc.* v. *Piper*, No. 79-701 (June 23, 1980), the Court held that "costs," as that term is used in 28 U.S.C. 1927, do not encompass the attorneys' fees referred to in Section 706(k). That holding is inapposite here. Crucial to the Court's interpretation of Section 1927 was that Section's common ancestry with 28 U.S.C. 1920 and 1923. Slip op. 7. The Court stressed that incorporating Section 706(k) in Section 1927 would force abandonment of the "uniform approach" intended by

VII *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978) (emphasis in original; footnote omitted); *New York Gaslight Club, Inc.* v. *Carey*, No. 79-192 (June 9, 1980), slip op. 8). A prevailing plaintiff is one who obtains relief, including relief by settlement. See *Maher* v. *Gagne*, No. 78-1888, (June 25, 1980), slip op. 7 (under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. 1988,[7] "[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees"). Acceptance of a valid Rule 68 offer, moreover, means that the court must enter judgment against the offeror ("the clerk shall enter judgment"). In Title VII cases, therefore, valid Rule 68 offers can impose no limits on the amount of attorneys' fees that the offeree may recover as part of costs then accrued.[8]

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the legislation which spawned Section 1927. Slip op. 8. By contrast, Rules 54(d) and 68 do not presuppose uniformity but absorb definitions of costs as they appear in the substantive statutes involved in the litigation. Equally crucial to the Court's decision in *Roadway Express* was the difference in the functions served by Section 1927 and Section 706(k). Section 1927 is "concerned only with limiting the abuse of court processes." Slip op. 9. Section 706(k) is concerned with reimbursing a successful plaintiff when he prevails on the merits of the action. The taxation of costs under Rules 54(d) and 68 similarly relates directly to judgments on a party's claim.

[7] 42 U.S.C. 1988 and 42 U.S.C. 2000e-5(k) "may be considered to have the same substantive content * * *. They authorize fee awards in identical language, and Congress acknowledged the close connection between the two statutes when it approved § 1988." *Roadway Express, Inc.* v. *Piper*, *supra*, slip op. 5 n.5.

[8] Two decisions that hold that attorneys' fees are not part of costs, *Cruz* v. *Pacific American Ins. Co.*, 337 F.2d 746 (9th Cir. 1964), and *Gamlen Chemical Corp.* v. *Dacor Chemical Products Co.*, 5 F.R.D. 215 (W.D. Pa. 1946), if correctly decided, are distinguishable. Neither was a civil rights action. Unlike here, the substantive statutes in both cases give courts broad discretion in awarding attorneys' fees. The courts therefore held that attorneys' fees had not "accrued" when the offers were made.

Petitioner's offer, which placed a limit of $450 on respondent's total recovery, including attorneys' fees, did not offer to reimburse respondent for all costs then accrued. In fact, it appears that her accrued costs, including attorneys' fees, substantially exceeded the amount of the offer (see note 3, *supra*); but even had that not been the case, the offer would remain defective under Rule 68 because the offer's express terms purported to limit the authority of the district court, following a timely acceptance by respondent, to tax in full the costs accrued at the time the offer was made.[9]

B. The Rule Does Not Apply in This Case Because the Offer Was Not a Reasonable Settlement Offer and No Judgment Was "Finally Obtained by the Offeree"

According to its plain language, Rule 68 applies only in those cases in which a "judgment [is] finally obtained by an offeree" and it is "not more favorable than the offer." See Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 895. As we show below, the history of the rule is consistent with this reading.

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[9] Although we have argued that attorneys' fees must be included as costs in any valid Rule 68 offer, we do not mean to suggest that the Title VII defendant who makes a valid Rule 68 offer is entitled to attorneys' fees as part of costs if the plaintiff recovers less than the offer. Under Title VII, defendants are not entitled to attorneys' fees "unless a court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 422. That condition of the applicable substantive statute properly governs an award of costs to a Title VII defendant under Rule 68.

That same history also makes it clear that the rule was necessarily promulgated with the understanding that it applied only to reasonable offers designed to settle cases and not to token offers aimed only at ensuring that all costs will be absorbed by the plaintiff in the event the defendant-offeror prevails on the merits. The two points are related, and we therefore discuss them together, even though the judgment in this case could be sustained on either ground.

As we show below, the rule as we believe it should be construed also operates in a way that best serves the purposes of this and other federal rules. If an offeree fails to obtain any judgment, costs are determined under Rule 54(d) where, as the prevailing party, the offeror will ordinarily recover not only his post-offer costs, but his costs for the entire litigation. Only where the court determines that justice requires some other result will the offeror not recover his costs, and a showing that the plaintiff had refused a reasonable offer would be a powerful restraining influence on a court's exercise of discretion to direct any cost allocation other than an award to the prevailing party.

1. *The Origins of Rule 68 Support Our Interpretation*

By limiting its annotation of Rule 68 to a citation of three state statutes (see page 10, note 4, *supra*), the advisory committee responsible for the original Federal Rules of Civil Procedure indicated that the purpose and effect of Rule 68 were to be evaluated in the light of existing state law, and of the cited statutes from Minnesota, Montana, and New York in particular.

Like the original rule, all three statutes describe the event triggering costs as the offeree's failure to obtain

(or recover) a judgment more favorable than the offer—language that would permit application of the provisions to cases in which a plaintiff-offeree recovered no judgment at all. 2 Minn. Stat. § 9323 (Mason 1927); 4 Mont. Rev. Code Ann. § 9770 (1935); J. Cahill & A. Griffin, *New York Civil Practice*, N.Y.C.P.A. § 177 (7th ed. 1937). But an examination of other provisions governing costs in those state codes reveals that costs were awarded as a matter of course to a prevailing party in most suits at law. See 2 Minn. Stat. §§ 9471-9473 (Mason 1927); 4 Mont. Rev. Code Ann. §§ 9787-9788 (1935); J. Cahill & A. Griffin, *New York Civil Practice*, *supra*, at §§ 1470-1475. In such cases there was thus no reason for a prevailing defendant to rely on a rejected offer of judgment (or "compromise" in the language of the Minnesota and New York statutes) in order to recover his costs and therefore no reason for the provisions to apply where the plaintiff recovered no judgment;[10] but these provisions did serve the important function of preventing a prevailing plaintiff from recovering his costs as a matter of course where he had rejected a reasonable offer and continued the litigation without good reason. See *Hochreich* v. *Amalgamated Laundries Inc.*, 240 N.Y.S. 11, 14, 136 Misc. 507, 510 (1930), cited in 3 *Moore's Federal Practice* 3364 (1st ed. 1938) (effect of a plaintiff's rejection of an offer of judgment "is to deprive [him] of his right to costs").

The offer of judgment provisions thus provided for most suits at law the benefits of a principle analogous to one commonly applied in actions in equity, in which

[10] We note that in every case cited by petitioner as illustrating the proper construction of state provisions similar to Rule 68 (Pet. Br. 8 n.5), the plaintiff had recovered a judgment.

costs were in the discretion of the court,[11] *i.e.*, that costs should be denied to a prevailing plaintiff where it is shown that he has "received a *bona fide* offer of a proper settlement before bringing suit, but * * * brings suit more or less vexatiously." *McCloskey* v. *Bowden*, 82 N.J. Eq. 410, 412 (1914).[12]

That cost provisions governing offers of judgment contemplate only reasonable offers with a chance of inducing settlement is indicated by the reference to "compromise" in the titles of statutes such as those of New York and Montana; and this assumption is also suggested in the case law. Moreover, the assumption underlies both state decisions that view offer-of-judgment statutes as deriving from the common law practice of permitting deposits in court of monies that

[11] See, *e.g.*, *Newton* v. *Consolidated Gas Co.*, 265 U.S. 78 (1924); *Wade* v. *Cox*, 115 N.J. Eq. 608, 172 A. 215 (1934); *Nolan* v. *Lantz Sanitary Laundry Co.*, 85 Colo. 247, 249, 274 P. 931, 932 (1929). This was not the case in all of the states, however. See, *e.g.*, Carroll's Ky. Rev. Stat. Ann. § 889 (Baldwin 1936) (providing for awards of costs to prevailing parties in actions in equity as well as in "ordinary" suits). In New York, statutes controlled cost awards in those equitable actions in which the plaintiff sought only a money judgment. J. Cahill & A. Griffin, *New York Civil Practice*, N.Y.C.P.A. §§ 1470(11), 1475, (7th ed. 1937).

[12] In holding that the precursor of the New York provision cited in the Advisory Committee Note to the 1938 rules did not apply in equitable actions, in which courts could, through the exercise of discretion, avoid injustice with respect to costs, a New York court observed that the rule was meant to apply only "to those cases where costs were allowed [as a matter of course]." *Conolly* v. *Hyams*, 58 N.Y.S. 932, 933 (1899). And see *Margulis* v. *Solomon & Berck Co., Inc.*, 223 A.D. 634 (N.Y. 1928), an action in which the plaintiff sought both damages at law and equitable relief. The court assumed that Section 177 of the New York Civil Practice Act might apply in the case but found "not permissible under our practice" defendant's offer of judgment for equitable relief only, remitting the plaintiff to his action at law for damages. 223 A.D. at 635.

a defendant admits are owing (see *Kaw Valley Fair Ass'n* v. *Miller*, 42 Kan. 20, 21, 21 P. 794, 795 (1889); Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law [hereafter "LCCR Br."] at 7) and those that regard them as statutory creations serving a somewhat different function. See *Wordin* v. *Bemis*, 33 Conn. 216, 217-218 (1866).

Thus, although the court in *Wordin* v. *Bemis*, *supra*, observed that the "conditions and effect" of the Connecticut offer of judgment statute were different from those of common law tenders, it cited as a purpose of the statute "the enabling of a party to buy his peace" (33 Conn. at 218), something that clearly could not be done by a token offer that implicitly denied any liability or did not amount to a true compromise. In *Herring-Hall-Marvin Safe Co.* v. *Letson Balliet*, 44 Nev. 94, 96, 190 P. 76-77 (1920), the court found valid under the Nevada statute an offer made as to one of plaintiff's two claims, but made it clear that this offer represented an acknowledgement that something was due the plaintiff ("the defendant may remove from the controversy the undisputed claim by the offer of judgment").[13] In a symposium on the new federal rules held shortly after they were issued in 1938, a member of the Advisory Committee echoed this conception of an offer when he explained Rule 68 as a rule "based upon statutes which are widely prevalent in the states," that "affords a means for stopping the running of costs where the defendant admits that part of the claim is good but proposes to contest the balance."

[13] The defendant-offeror recovered his costs only because plaintiff's total recovery amounted to less than the offer on the single claim. *Ibid.* The offer was not required to include costs because the Nevada statute did not mandate inclusion of costs accrued. *Ibid.*

American Bar Ass'n, *Rules of Civil Procedure for the District Courts of the United States with Notes as prepared under the direction of the Advisory Committee and Proceedings of the Institute on Federal Rules, Cleveland, Ohio* 337 (1938).

State courts have also expressed the understanding that an offer of judgment must amount to a genuine proposal to compromise by expressly describing the offers contemplated by the statute in question as "fair" or "reasonable," and they have linked this idea to a statutory purpose of encouraging the settlement of litigation. See, *e.g.*, *Brown* v. *Nolan*, 98 Cal. App. 3d 447, 449, 159 Cal. Rptr. 469, 470 (1st Dist. Ct. 1979) (purpose of statute "is to encourage the settlement of litigation without trial" and effect "is to punish the plaintiff who fails to accept a reasonable offer from a defendant"); *Benda* v. *Fana*, 10 Ohio St. 2d 259, 262, 227 N.E.2d 197, 200 (purpose of statute is "the termination of litigation where a defendant tenders to a plaintiff a fair offer to allow judgment").[14]

When Rule 68 was amended in 1946, the committee note made no comment on the change from wording

[14] A survey of state cases also reveals that where typical offer-of-judgment cost-shifting rules have been applied, the offers have been substantial in relation to the claims at issue. See, *e.g.*, *McNally* v. *Rowan*, 92 N.Y.S. 250 (1905) (offer of $1,376.56 to settle $1,576.56 claim; $1,195.58 plus interest awarded to plaintiff; plaintiff awarded costs because offer did not provide for establishment of lien, so plaintiff's recovery was "more favorable"); *Schnute Holtman & Co.* v. *Sweeney*, 136 Ky. 773, 125 S.W. 180 (1910) (offer of $800 plus interest to settle claim of $1,117.46; judgment was $803 without interest); *Yeager* v. *Campion*, 70 Colo. 183, 197 P. 898 (1921) ($10 offer to settle $12.50 claim; judgment was $10); *Terry* v. *Burger*, 6 Ohio App. 2d 53, 216 N.E. 2d 383 (1966) (offer of $50 to settle $100 claim; judgment was $35).

that would make the rule applicable to cases in which the party adverse to the defending party obtained no judgment ("[i]f the adverse party fails to obtain a judgment more favorable than that offered") to the present wording that assumes that such a judgment is obtained before the rule is invoked ("[i]f the judgment finally obtained by the offeree is not more favorable than the offer"). 5 F.R.D. 482, 483 (1946).[15] In view of the way in which, as shown above, similar state provisions operated, the most likely explanation for this omission is that the drafters of the amendment thought that this rewording merely conformed to the sense of the original as generally understood and thus required no comment. The committee similarly failed to explain that the offers to which the rule would apply were reasonable offers that implicitly recognized some merit to the claim and proffered something to settle it; but the committee's observation that one purpose of the rule was "to encourage settlements" is consistent with such an understanding of the rule. 5 F.R.D. at 483. Again, the committee may simply have decided that it was unnecessary to comment on what was generally understood.

2. *Under Our Interpretation, Rule 68 Operates Properly in Tandem with Rule 54(d)*

Because, in our view, Rule 68 applies only in cases in which a party who has rejected a reasonable offer

[15] The sentence in the original rule in which that language appeared was converted into two sentences designed to make it clear that an adverse party could make more than one offer if prior offers were not accepted, so long as the offer preceded a trial, *e.g.*, a second trial after nullification of the judgment in the first or a bifurcated proceeding relating to relief after the determination of liability. 5 F.R.D. at 483.

recovers a judgment less favorable than the offer, costs in a case such as this one will necessarily be determined under Fed. R. Civ. P. 54(d). As we show below, this procedure best serves the purposes of both Rule 54(d) and Rule 68, and is most likely to secure a "just, speedy, and inexpensive determination of every action"—the standard by which, according to Rule 1, Fed. R. Civ. P., the rules are to be construed.

In Rule 54(d), the general provision governing costs in civil proceedings, the drafters of the federal rules combined traditional principles relating to costs in actions at law and actions in equity, making "generally applicable the rule heretofore applied in actions at law, that costs follow the event as a matter of course" but confiding to the courts "a measure of discretion," permitting them to direct otherwise in particular cases. American Bar Ass'n, *Proceedings of the Institute [on Federal Rules] at Washington, D.C. * * * and of the Symposium at New York City* 174 (1938). This provides a firm and reasonable guideline for determining costs, but allows a court to do justice in a particular case when application of the traditional rule for actions at law might be unfair.

To permit token offers, routinely made early in the litigation, to deprive a court of this measure of discretion in cases where the plaintiff has unsuccessfully pursued a nonfrivolous claim would in no way serve the purpose of Rule 68 "to encourage settlements," and it thus would trench on the policies of Rule 1 and Rule 54(d) for no reason. Indeed, giving such an effect to token offers—completely unrelated to the claims in the litigation—would tend to discourage settlements, by inducing defendants to make minimal offers upon

service of the complaint (*e.g.*, $10 with accrued costs) that will almost inevitably be rejected.[16]

Such a construction of the rule would also serve to undermine the policies of Title VII, as the court below noted (J.A. A6-A7), by reducing the incentive for enforcement of this and other antidiscrimination statutes because defendants would be armed with a guaranteed means of penalizing, regardless of the circumstances, "private attorneys general" who file nonfrivolous but ultimately unsuccessful actions.[17] But there is no need for a construction that would bring the rule into conflict with these important statutory policies.

Indeed, requiring Rule 68 offers to be reasonable does not introduce a new element into the rule. The district courts have generally assumed that a requirement that offers be reasonable is implicit in the rule. In *Gay* v. *Waiters and Dairy Lunchmen's Union, Local No. 30, 86 F.R.D. 500, 502*, 22 Fair Empl. Prac. Cas. 1249, 1250 (N.D. Cal. 1980), the court held that

[16] The earlier the offer is made, the cheaper the defendant's insurance against the use of Rule 54(d) would be. Costs accrued would be lowest and costs to be assessed against the losing plaintiff the greatest. And as the author of the only substantial comment on Rule 68 has noted, the offer is "riskless": a token offer is unlikely to induce acceptance; and even if the plaintiff accepts, the resulting judgment would have no issue-preclusion effect on future litigation. Note, *Rule 68: A New "Tool" for Litigation*, 1978 Duke L.J. 889, 891 n.14.

[17] See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1974). The Court has repeatedly stated that the Title VII policy against discrimination is of the highest national priority and is to a large extent vindicated by "private attorneys general." *See New York Gaslight Club, Inc.* v. *Carey*, No. 79-192 (June 9, 1980), slip op. 8; *Franks* v. *Bowman Transportation Co. Inc.*, 424 U.S. 747, 763 (1976); *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 416; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

under Rule 68 "an award of costs is mandatory, provided the offer was *reasonable and in good faith*" (emphasis supplied). In *Honea* v. *Crescent Ford Truck Sales, Inc.*, 394 F. Supp. 201, 202, 203 (E.D. La. 1975), the court held that the "duty to be reasonable should not be borne by the plaintiff alone" and that a defendant can protect against costs "[i]f a *reasonable* offer is spurned" pursuant to Rule 68 (emphasis supplied). In *Mr. Hanger Inc.* v. *Cut Rate Plastic Hangers*, 63 F.R.D. 607, 610 (E.D.N.Y. 1974), the court considered the plaintiff's contention that the offer was a "sham" and held that the offer was not because it "afforded the plaintiff substantially the relief prayed for in its complaint." (See also state cases discussed at pages 18–20, *supra*.)

Nor does this construction of the rule require an unworkable, subjective test. An offer is unreasonable when a court finds that the offer is so low that it could not have induced a reasonable person to settle at the time when the offer was made. The courts are, of course, thoroughly familiar with the "reasonable person" standard. The standard is an objective one, obviating inquiry into the parties' motives. Inasmuch as the principal purpose of Rule 68 is settlement, the primary gauge for judging reasonableness is the relationship of the offer to the relief that the offeree would be likely to obtain if successful in any of his nonfrivolous claims, taking into account the litigation risks at the time the offer is made.[18]

[18] We do not disagree with the proposition (LCCR Br. 10) that both the state counterparts of Rule 68 and the federal rule itself contemplate "genuine offers," but in our view the ultimate test of genuineness is not the sincerity of the offeror but the reasonableness of the offer.

With respect to our submission that the rule does not apply in cases in which a plaintiff obtains no judgment, it might be contended that this gives the plaintiff who obtains nothing at all an unfair advantage over the plaintiff who obtains a judgment slightly less favorable than a reasonable offer from the adverse party which the plaintiff declined to accept.[19] Unjust results are likely to be few, however. In cases in which the plaintiff obtains nothing, costs will be determined under Rule 54(d), and a defendant who has made a reasonable offer that was rejected by the plaintiff is free to bring that fact to the court's attention, as a matter relevant to the court's exercise of discretion. See *Baldwin Cooke Co.* v. *Keith Clark, Inc.*, 73 F.R.D. 564 (N.D. Ill. 1976). Indeed, where it appears that a plaintiff litigated vexatiously after a fair offer, it may well be an abuse of discretion for a court to direct that the prevailing defendant not be awarded costs.[20] Under the proper application of both Rule 68 and Rule 54(d), then, the usual result will be similar to that aimed for in both suits at law and actions in equity in state courts (see pages 16–20, *supra*), although some injustices may be avoided under the federal rules that would have occurred under traditional state practices

[19] We note that two district courts in recent years have applied Rule 68 in a case in which the plaintiff-offeree obtained no judgment. *Mr. Hangar Inc.* v. *Cut Rate Plastic Hangars*, *supra*; *Dual* v. *Cleland*, 79 F.R.D. 696 (D.D.C. 1978). It appears, however, that the question whether the rule properly applies in such cases was not expressly considered.

[20] If it is determined that the plaintiff's persistence in seeking more than is offered amounts to the pursuit of a claim that has clearly become "frivolous, unreasonable, or groundless," then the award of costs to the defendant could include attorneys' fees. *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 422.

because of the lack of discretion to withhold the award of costs to a prevailing defendant in most suits at law.

In this case, the principles set out above have been properly applied and have worked no injustice. Respondent had a claim—determined by both courts below to be nonfrivolous (J.A. A5, A12)—which, if successful, was likely to entitle her to reinstatement, backpay amounting to approximately $20,000, and her costs, including attorneys' fees. She reasonably declined petitioner's offer of $450 including attorneys' fees, made at a point in the litigation when she had incurred attorneys' fees well above that amount. To permit petitioner's offer—which as the district court properly concluded (J.A. A12) was no real inducement to settle—to deprive the court of its discretion respecting costs under Rule 54(d) would be to countenance a misuse of Rule 68 that would undermine the purposes of Rule 1, Rule 54(d), Rule 68, and the statute under which the suit was brought.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION UNDER RULE 54(d) BY ORDERING BOTH PARTIES TO BEAR THEIR OWN COSTS

Although it did not raise the issue in the court of appeals, petitioner now challenges (Pet. Br. 24-25) the district court's refusal to exercise its discretion under Rule 54(d) to allow it costs.[21] Where, as here, an issue

[21] Unlike Rule 54(d), Rule 68 mandates only that the offeree pay the costs of the adverse party for the period after an offer meeting the rule's requirements was made. There is no provision in Rule 68 for charging pre-offer costs to the offeree, although the court might rely on Rule 54(d) for authority to impose such additional costs to the offeree. This awkward circumstance provides another reason for construing Rule 68 as applying only in cases in which the offeree has obtained a judgment.

has not been passed upon by the court of appeals, this Court ordinarily declines to consider it. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973); *Adickes* v. *S. H. Kress and Co.*, 398 U.S. 144, 147 n.2 (1970). We see no reason for the Court to depart from that salutary practice here.

In any event, we do not agree that requiring each party in this case to bear its own costs is an abuse of discretion under Rule 54(d). That rule provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs," and this Court has accordingly held that allowing costs "to the prevailing party is not * * * a rigid rule." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946). See also *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227 (1964). Appellate review of this discretion is properly limited because the trial judge is in the best position to weigh the equities of the case. See *LeLaurin* v. *First National Bank of San Antonio*, 391 F.2d 687, 692 (5th Cir. 1968).

It is not an abuse of discretion for a court to refuse costs to the prevailing party when "it would be inequitable under all the circumstances * * * to put the burden of costs upon the losing party." *Lichter Foundation, Inc.* v. *Welch*, 269 F.2d 142, 146 (6th Cir. 1959). In the circumstances of this case it was not an abuse of discretion for the district court to have both parties bear the costs of the litigation.[22]

[22] Petitioner's concern (Pet. Br. 25) that such a ruling would encourage plaintiffs to sue, while acting as a disincentive for defendants to defend cases, is unfounded, at least in employment discrimination cases. Plaintiffs in such actions are, like respondent, generally financially hard pressed. Having to pay

Although the court did not make express findings with respect to its costs determination,[23] the court was obviously aware that respondent is an unemployed airline stewardess who pursued nonfrivolous, although unsuccessful, claims; that her rejection of petitioner's offer of judgment was not unreasonable; that she is without significant financial means and must already pay her own litigation expenses to the extent that she is able to do so; that the costs are large; and that it would not be oppressive for petitioner to absorb its own litigation costs. The court's refusal to award petitioner costs in these circumstances was therefore in keeping with the instruction of Rule 1 that the rules be interpreted to promote a just determination of the action.

---

their own litigation costs is itself a significant deterrent to bringing or maintaining an action.

[23] See, *e.g.*, *True Temper Corp.* v. *CF&I Steel Corp.*, 601 F.2d 495, 509-510 (10th Cir. 1979); *Walters* v. *Roadway Express, Inc.*, 557 F.2d 521, 526 (5th Cir. 1977); *Compania Peli-neon De Navegacion* v. *Texas Petroleum Co.*, 540 F.2d 53, 56-57 (2d Cir. 1976).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 79-814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

I.

POLICY ARGUMENTS OF RESPONDENT AND *AMICI CURIAE* DO NOT SUPPORT THE EXCLUSION OF RULE 68 FROM TITLE VII CASES.

Delta submits that, when read together, Respondent and the various opposing *amici*[1] would have this Court abrogate the

[1] Citations to "Pet. Br." refer to the Brief for the Petitioner. Citations to "EEAC Br." refer to the Brief of the Equal Employment

(Footnote continued on following page)

operation of Rule 68 in all Title VII litigation.[2] Respondent, *amici* the United States and EEOC, and *amicus* Lawyers'

(Footnote continued from preceding page)

Advisory Council as Amicus Curiae. Citations to "Resp. Br." refer to the Brief for the Respondent. Citations to "Gov't. Br." refer to the Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae. Citations to "NAACP Br." refer to the Brief for the National Association for the Advancement of Colored People as Amicus Curiae. Citations to "ACLU Br." refer to the Brief for the American Civil Liberties Union as Amicus Curiae. Citations to "LCCR I Br." refer to the Brief of the Lawyers' Committee for Civil Rights Under Law, Washington, D.C. branch as Amicus Curiae. Citations to "LCCR II Br." refer to the Brief of the Lawyers' Committee for Civil Rights Under Law, Chicago branch as Amicus Curiae. Citations to "NWLC Br." refer to the Brief for the Northwest Women's Law Center as Amicus Curiae.

[2] Delta additionally notes that Respondent, *amici* United States and EEOC, and *amicus* Lawyers' Committee I have included in their briefs the following misleading, irrelevant and/or wholly unsupported statements which should be excised by this Court:

Resp. Br.

> "Here in a case involving an individual claim, Delta ran up what Ms. August estimates to be at least $10,000 in costs." (p.6)
>
> "This figure is based on approximately $6,000 in costs incurred by Ms. August at trial, recognizing Ms. August's second copy of Delta's "same day" and "next day" order of Transcript and Delta's $2,300 in costs on appeal." (p.6, n.1)
>
> "Ms. August's employment record was not substantially dissimilar from that of many of her co-workers. Nonetheless, during her employ with Delta she was singled out in a variety of ways. She was required to have a medical examination for venereal disease, she was suspended for seven days for serving a tepid cup of coffee despite the conclusion of her supervisor that the complaint was unjustified and her supervisor noted in a file review that she "should be watched." (p.7)

(Footnote continued on following page)

(Footnote continued from preceding page)

> "It is of interest to note that Delta has made precisely the same purported offer of judgment in the amount of $450 in a subsequent Title VII case." (p. 13, n.3)
>
> "Following her discharge, Ms. August, not unlike other such plaintiffs, was unable to obtain similar employment. At best she found intermittent jobs as a sales person. At the time of trial she was unemployed. Ms. August had lost her health benefits which were significant to her because of a chronic illness. She also had lost a number of other benefits which either she could not afford or it was impossible to replace. Her only hope to recoup her financial losses and remove the tarnish on her employment record, was to bring a Title VII lawsuit to win back what she felt had been unjustly denied her." (p.20)

Gov't Br.

> "We have been informed by respondent's counsel that she had spent 39 hours on this case by May 12, 1977, and that her billing rate is $50 per hour. At the time of petitioner's offer, therefore, respondent's attorneys' fees could have been as much as $1,950." (p.4 n.3)
>
> "[S]he is an unemployed airline stewardess for whom even her own costs of litigation represent a considerable burden, and petitioner is clearly able to absorb its own costs." (p.9)
>
> "In fact, it appears that her accrued costs, including attorneys' fees, substantially exceeded the amount of the offer (see note 3, *supra*);" (p.15)
>
> "She reasonably declined petitioner's offer of $450 including attorneys' fees, made at a point in litigation when she had incurred attorneys' fees well above that amount." (p.26)
>
> "Although the court did not make express findings with respect to its costs determination, the court was obviously aware that respondent is an unemployed airline stewardess who pursued nonfrivolous, although unsuccessful, claims; that her rejection of petitioner's offer of judgment was not unreasonable; that she is without significant financial means and must already pay her own litigation expenses to the extent that she is able to do so; that the costs are large; and

(Footnote continued on following page)

Committee I argue that prevailing defendants cannot use Rule 68 to recover litigation costs (Resp. Br. at 14-19; Gov't Br. at 11; LCCR I Br. at 7). *Amicus* Lawyers' Committee II and Respondent make the further argument that in cases where Rule 68 does apply (presumedly only in cases where plaintiff prevails but in a lesser amount than offered), that its application is not mandatory but discretionary (Resp. Br. at 19-22; LCCR II Br. at 37). Finally *amicus* NAACP urges that Rule 68 should not apply even where a prevailing plaintiff has previously spurned an offer more favorable than the ultimate judgment. (NAACP Br. at 8-10).

Implicit in these arguments against the use of Rule 68 in Title VII cases is the conclusion that Title VII plaintiffs are so favored under public policy that they may engage in cost-free litigation, provided only that such litigation not be frivolous, unreasonable or groundless. Delta submits that such a result is consonant with neither the policies underlying Rule 68 nor Title VII and should be rejected.

(Footnote continued from preceding page)

> that it would not be oppressive for petitioner to absorb its own litigation costs." (p.28)

LCCR I Br.

> "They must also have been aware that she was an unemployed stewardess without financial resources who had to bear her own litigation costs." (p.6 n.2)

We submit that the above quoted statements constitute an affront to this Court and an abuse of the privilege of appearing before this Court. The creation or fabrication of emotionally charged arguments have no legal justification.

A.

Title VII Plaintiffs Will Not Be "Chilled" By A Mandatory Operation Of Rule 68

The argument (Resp. Br. at 5; Gov't. Br. at 23; J.A. A6) which suggests that a mandatory application of Rule 68 will have a chilling effect on Title VII plaintiffs is not persuasive. Presently, numerous incentives exist for plaintiffs to sue under Title VII. A prevailing plaintiff is awarded both costs and attorney's fees pursuant to § 706(k) of the Civil Rights Act of 1964, as amended, in all but "special circumstances". *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978). Further, a plaintiff may receive an award of attorney's fees for administrative proceedings. *New York Gaslight Club, Inc.* v. *Carey*, 48 U.S.L.W. 4645 (U.S. June 9, 1980.) Moreover, certain bonuses for plaintiff's attorneys have become acceptable practice. *See, e.g. Copeland* v. *Marshall*, ____F.2d ____, 23 Fair Empl. Prac. Cases 967, 975 (D.C. Cir. 1980); *Parker* v. *Califano*, 443 F.Supp. 789, 793-94 (D.D.C. 1978)

While providing incentives for plaintiffs to sue, Congress and this Court have heretofore acknowledged that there must be an accommodation of competing considerations to effectuate the continuing policy that a fair adversary process requires both a vigorous prosecution and a vigorous defense. *Christiansburg Garment Co., supra* at 419. Thus even if there were no Rule 68, a Title VII plaintiff would know, in light of *Christiansburg*, that to pursue a frivolous, unreasonable or groundless claim would result in an award of defendant's attorney's fees. Further, and of more compelling significance in the instant case, a plaintiff should know the presumption under Federal Rule 54(d) that a losing plaintiff will have to pay all litigation costs.

Certainly the mandatory operation of Rule 68 does not increase the risks presently inherent in Title VII litigation. If Rule 68 creates a "chilling effect" which compels its abrogation,

then § 706(k), Rule 54(d) and this Court's *Christiansburg* decision all need to be jettisoned for they are similarly "chilling".

B.

The Mandatory Application Of Rule 68 Promotes Settlement

There is apparently no dispute among the parties, *amici* and the lower courts that the principal reason for Rule 68's existence is to promote settlement (Resp. Br. at 5; Gov't Br. at 10; J.A. A5, A11).

Delta submits that the most effective means of promoting settlement and reducing litigation is a mandatory application of Rule 68. Such an approach requires that each party realistically evaluate its respective case. A defendant who underestimates its exposure gains nothing by the utilization of an offer of judgment. Likewise, a plaintiff who persists in litigating a claim after an offer has been made is put on notice that litigation costs will be assessed if the ultimate judgment does not exceed the settlement offer. Only by knowing, with certainty, what consequences will obtain by an unrealistic assessment, will parties be compelled to evaluate their claims realistically. Neither the Seventh Circuit's amorphous standard (J.A. A7), nor the *amici* Government's "reasonableness" standard (Gov't Br. at 24), nor Respondent's "discretionary" standard (Resp. Br. at 22), nor the *amicus* Lawyers Committee I "genuineness" standard (LCCR I Br. at 7) for the application of Rule 68 promotes settlement. To the contrary, each creates more uncertainty in the evaluative process, both for the parties and for the trial judge. Thus, what is a "reasonable" or "genuine" amount for the defendant to offer when in fact the plaintiff is entitled to nothing? Is it a function of the prayer for relief, or the abilities of opposing counsel that should determine reasonableness or

genuineness? Does it depend on the size or profitability of the defendant, or the wealth of the plaintiff? Does a claim known by defendant to have no merit become more valuable with the mere passage of time, or because plaintiff's counsel engages in lengthy, but unproductive discovery efforts?

Delta's proffered standard for Rule 68 is simple, certain and fair. It protects only the defendant who offers to have judgment taken against it in an amount in excess of that which plaintiff ultimately receives. Furthermore, in the context of settlement, the use of Rule 68 is not "cheap insurance". (See J.A. A5; Resp. Br. at 21; LCCR II Br. at 22).[3] Unlike most customary forms of settlement, a defendant utilizing Rule 68 does not receive a non-admission clause.[4] Instead, such a defendant receives a judgment entered against it, finding it liable for having discriminated.

C.

Meritless Cases Need No Encouragement

Delta concludes (Pet. Br. at 17), as have Congress and this Court, that meritless Title VII cases need no encouragement. *See Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 420 (1978). Concomitant with this policy is the desirability of avoiding the proliferation of lawsuits, particularly marginal suits with little likelihood of success. A mandatory application and interpretation of Rule 68 is entirely consistent with this policy.

---

[3] Insurance against hurricanes in Chicago may well be "cheap", as compared with similar insurance along the Gulf Coast. This Court may take judicial notice of the fact that insurance premiums, like settlement offers, depend upon the degree of risk and exposure involved.

[4] *See, e.g. Maher* v. *Gagne*, 48 U.S.L.W. 4891, 4892 n.8 (U.S. June 25, 1980); *see also* Standard EEOC Settlement Agreement form, reprinted in the Appendix to this brief. (Pet. Reply Br. App. at 16a-17a).

Without such an approach, the balance between a plaintiff's incentives to sue and a defendant's right to be free from at least its litigation costs when it utilizes Rule 68 becomes skewed. Perhaps if trial judges more assiduously followed the prescription of Rule 54(d), defendants would have no need to use Rule 68 in cases, as the instant one, which are viewed as and ultimately found to be baseless. Unfortunately, the trend appears to be toward the sort of unexplicated award given by the trial judge below: that even though defendant prevailed it had to bear its own litigation costs.[5]

This result was upheld by the same panel of the Seventh Circuit which found that plaintiff's evidence of discrimination was "superficial, incomplete, inadequate or otherwise defective. The evidence failed to establish that [plaintiff] was treated differently than similarly situated whites." (J.A. A16). Further, this panel of the Seventh Circuit held that "[r]egardless of the deficiencies of the plaintiff's evidence, the defendant strongly defended the action with a non-discriminatory explanation . . . . The record suggests considerable company forebearance without regard to the employee's race." (J.A. A16-18).

It is precisely this kind of case which compels a mandatory application of Rule 68; one that is without merit but not quite (according to the lower courts) "frivolous". (J.A. A12, A18). Defendants need protection against litigious plaintiffs with baseless, if not frivolous, claims; protection that is not being uniformly provided by the judiciary.

[5] Delta has attached as an appendix to this brief its review of all reported decisions found in BNA's Fair Employment Cases covering the most recent five volumes, in cases where cost awards were mentioned and where defendant prevailed. (Pet. Reply Br. App. at 1a-9a). This review shows that all too often the courts have left the completely innocent defendant burdened with the costs of the litigation. This Court would do well to admonish the lower courts to be more receptive and aware of the plight of the innocent defendant.

II.

NONE OF THE VARIOUS TECHNICAL OBJECTIONS TO DELTA'S OFFER ARE SUPPORTABLE

Respondent and *amici* present numerous technical objections to the form and manner of Delta's offer in the instant case. The arguments advanced, however, are self-repudiating and Delta will briefly treat such objections seriatim.

A.

Plaintiff Is Not Required To Prevail

Both Respondent and the Government contend that Rule 68 may only be used in instances where plaintiff actually prevails at trial, but in an amount less than that offered (Resp. Br. at 14-19; Gov't Br. at 11). The Government's insistence on this position is reminiscent of the "whose ox is being gored" theory of justice,[6] since it was the Government as defendant in *Dual* v. *Cleland*, 79 FRD 696 (D.D.C. 1978) which pursuaded Judge Richey to vacate his order that "each party bear its own costs" in light of its Rule 68 offer.[7] In *Dual*, the court had dismissed plaintiff's Title VII claim against the United States Veterans Administration and awarded judgment to defendant.

Irrespective of the Government's duplicity, the argument is not supported by logic, the language of the rule or prior case precedent. Indeed, the only support relied upon by Respondent and *amici* is a comment written by a law student. (Resp. Br. at 14; Gov't Br. at 15).

[6] *See* A. Bickel, The Morality of Consent 133 (1975).

[7] A reproduced certified copy of the Government's motion to award costs pursuant to Rule 68, together with plaintiff's memorandum in opposition, is set forth in the Appendix to this brief. (Pet. Reply Br. App. at 10a-15a).

It is illogical to assume that the framers of the Federal Rules would have adopted a rule which protected guilty defendants against obdurate plaintiffs, but gave no such protection to innocent defendants. The language of the Rule, as initially written or as amended effective March 19, 1948, does not compel such a conclusion. To the contrary, it simply states the condition precedent to the mandatory cost-shifting, that plaintiff obtain less by judgment than that offered by defendant. It matters not whether the judgment is a dismissal of all claims or one in favor of plaintiff, the key is that it must be less favorable than that offered.[8]

Delta concedes that the case law is sparse with respect to prevailing defendants being awarded costs pursuant to Rule 68. But to paraphrase Justice Black, such silence is pregnant with significance. *See NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964). No occasion arises for a prevailing defendant to request costs pursuant to its prior offer of judgment until the court has denied it costs, even though it prevailed. The fact that early state court decisions applying rules similar to Rule 68 involved cases where the plaintiff won something proves nothing if, in cases where defendant prevailed, such defendant was awarded costs without regard to any offer of judgment. It is only where, as appears to be the case all too often in Title VII litigation, the court imposes costs upon the prevailing defendant, that recourse to an offer of judgment rule becomes necessary.[9] Nevertheless, since the promulgation of Rule 68 in

[8] Respondent argues that Ms. August received no judgment (Resp. Br. at 14.) That contention is obviously erroneous. "Judgment" as the term is used in the Federal Rules of Civil Procedure is defined in Rule 54(a) to mean "a decree and any order from which an appeal lies." It is simply the term selected to refer to the court's decision. Accordingly, all parties in litigation obtain a "judgment" when the court renders its decision.

[9] Respondent tacitly concedes this point since it asserts that prior to the adoption of the Federal Rules, costs incurred by a prevailing party "were uniformly paid by the unsuccessful opponent." (Resp. Br. at 18).

1938, several federal courts, and the Seventh Circuit in the instant case, have accepted without question the use of a Rule 68 offer by a prevailing defendant. *See Truth Seeker Co.* v. *Durning*, 147 F.2d 54 (2d Cir. 1945); *Gay* v. *Waiters and Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500 (N.D. Cal. 1980); *Scheriff* v. *Beck*, 452 F.Supp. 1254 (D. Colo. 1978); *Dual* v. *Cleland*, 79 F.R.D. 696 (D.D.C. 1978); *Mr. Hanger, Inc.*, v. *Cut Rate Plastic Hangers, Inc.* 63 F.R.D. 607 (E.D.N.Y. 1974); *Staffend* v. *Lake Central Airlines, Inc.*, 47 F.R.D. 218 (N.D. Ohio 1969).[10]

B.

The Offer Was Proper

The Government and other *amici* argue that Delta's offer was not proper because it restricted the amount of attorney's fees by including them as part of its $450. (Gov't Br. at 14; LCCR II Br. at 7.) The anomaly of such a proposition is self-evident. It would completely thwart the proper use of a Rule 68 offer in cases such as the instant one, where defendant has evaluated plaintiff's claim as meritless. It would compel a defendant to make an offer immediately upon receipt of a complaint, lest it be liable for unwarranted fees of discovery and pretrial proceedings. It would discourage settlement and encourage litigation for, as the suit developed (and arguably counsel became more aware of the lack of merit of the case), plaintiff's attorney's fees would steadily climb; there would be no incentive for defendant to settle a baseless claim by having to pay all of plaintiff's expenses. Indeed, the very uncertainty of the amount might well preclude any offers.

[10] *See also Miklautsch* v. *Dominick*, 452 P.2d 438, 440 (Alaska 1969) where the Supreme Court of Alaska, interpreting its Rule 68 (identical to Federal Rule 68), specifically held that its Rule 68 could be used "regardless of who is the prevailing party. . . ." *Id.* at 440.

Delta's offer was proper and consistent with the policies of both Title VII and Rule 68.[11] Delta offered to pay $450, which amount was to include attorney's fees; in addition, it would pay whatever regular costs had then accrued. The offer did not exclude attorney's fees, as in *Scheriff* v. *Beck*, *supra* at 1259; it merely set a fixed amount it was willing to pay.

A party wishing to settle an action, including a Title VII case, may surely select the amount for which it is willing to settle. The risk of Delta's approach is obvious in cases such as Title VII which provide for an award of attorney's fees, in the court's discretion, to a prevailing party. By including attorneys fees as part of the overall offer, a defendant must realize that if plaintiff prevails, the amount awarded as fees will be added to whatever relief is obtained in order to determine whether the offer was more favorable than the outcome. In this case the $450 offer, including attorney's fees, was clearly more favorable since plaintiff recovered no relief and no attorney's fees. To urge, as did the trial court and *amici* Government (J.A. A12; Gov't Br. at 15) that plaintiff's attorneys fees had exceeded the $450 offer is to ignore that plaintiff and her attorney must be aware that *no* legal fees would be forthcoming if plaintiff does not prevail. *See, e.g. Copeland* v. *Marshall*, ___ F.2d ___, 23 Fair Empl. Prac. Cases 967, 975 (D. C. Cir. 1980).

[11] It should be noted that at the time of its offer, May, 1977, Delta did not have the benefit of the cases relied upon by the Government (Gov't Br. at 13-14) in its attack on Delta's offer, *i.e. Scheriff* v. *Beck*, decided in 1978, *Christiansburg Garment Co.* v. *EEOC*, decided in 1978, *New York Gaslight Club, Inc.* v. *Carey*, decided in 1980, or *Maher* v. *Gagne*, decided in 1980. Delta submits that these cases do not alter the conclusion that its offer was, in any event, a proper one.

C.

The Lower Courts' Abuse Of Discretion Is An Issue

Respondent and *amici* argue that Delta cannot raise before this Court its claim that the lower courts abused their discretion by not awarding Delta its litigation costs (Resp. Br. at 22; Gov't. Br. at 26-27.). Such assertions are specious.

Delta has argued throughout these proceedings that to inject the court's discretion into Rule 68 renders it essentially duplicative of Rule 54(d) (Appellant's Brief before the Seventh Circuit at 9-10; Appellant's Petition for Rehearing and Suggestion for Hearing *En Banc* at 4.). Further, Delta has argued that under either the trial court's or the appellate court's standards, Delta should have been awarded its costs (Appellant's Petition for Rehearing and Suggestion for Hearing *En Banc* at 8-9.). Thus the question of the lower courts' abuse of their discretion, whether under Rule 54(d) or their redrafted versions of Rule 68, has been an issue throughout. Accordingly, it is entirely proper for this Court to consider the issue of abuse of discretion. *Cf. Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 16 (1941).

D.

Delta's Offer Denied Liability

Amici Lawyers' Committee I and Lawyers' Committee II argue that Delta's offer was defective because it denied liability. (LCCR I Br. at 6, 10; LCCR II Br. at 10.) Such *amici* either misread or misapprehended both Delta's offer and Rule 68. The offer on its face allowed for judgment to be taken against Delta in the amount of $450, plus accrued costs. (Pet. App. at 34) If accepted, all that would have remained was for the clerk to enter judgment; a result to which Delta was obviously subjecting itself.

The last sentence of the offer indicated merely that the offer itself was not, outside of the operation of Rule 68, to be construed as an independent admission of liability which could be used against Delta if the offer was rejected. That is all that was intended, and as such the offer was entirely consistent with the operation of Rule 68.

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Appendix

APPENDIX TO REPLY BRIEF FOR PETITIONER

The following index is an analysis of decisions pertaining to the disposition of costs and attorney's fees in Title VII and 42 U.S.C. § 1981 employment discrimination cases where the defendant has prevailed. The index considers the decisions reported in Volumes 19-23 (inclusive of the October 18, 1980 reporter) of the BNA's Fair Employment Cases decided following this Court's opinion in *Christiansburg Garment Co.* v. *E.E.O.C.*, 434 U.S. 418 (1978). The cases included represent reported decisions where the courts either expressly ordered or denied costs and attorney's fees.

I.

Decisions in Title VII and 42 U.S.C. § 1981 Cases where the defendant has prevailed and federal courts have held that each party should bear its own costs of litigation.

A.

VOLUME 19

1) *E.E.O.C.* v. *North Hills Passavant Hospital*, 466 F. Supp. 783, 19 FEP Cases 211 (W.D. Pa. 1979).

2) *Gilbert* v. *East Bay Municipal Utility District*, ___ F. Supp. ___, 19 FEP Cases 304 (N.D. Cal. 1979).

3) *Wilson* v. *Sharon Steel Corp.*, ___ F. Supp. ___, 19 FEP Cases 336 (W.D. Pa. 1979).

B.

VOLUME 20

4) *E.E.O.C.* v. *A.R.A. Manufacturing Co.*, ___ F. Supp. ___, 20 FEP Cases 1268 (N.D. Tex. 1979).

C.

VOLUME 21

5) *De Medina* v. *Reinhardt* ____ F. Supp. ____, 21 FEP Cases 75 (D.D.C. 1979)

6) *Martin* v. *Arkansas Arts Center*, 480 F. Supp. 156, 21 FEP Cases 560 (E.D. Ark. 1979)

7) *Delta Air Lines, Inc.* v. *August*, ____ F. Supp. ____, 21 FEP Cases 634 (N.D. Ill. 1978), *aff'd*, 600 F.2d. 699, 21 FEP Cases 642 (7th Cir. 1979), *cert. granted*, ____ U.S. ____, 100 S. Ct. 1833 (1980)

8) *Dual* v. *Cleland*, ____ F. Supp. ____, 21 FEP Cases 1721 (D.D.C. 1978), *modified*, 79 F.R.D. 696, 21 FEP Cases 1730 (D.D.C. 1978)

D.

VOLUME 22

9) *Cross* v. *U.S. Postal Service*, 483 F. Supp. 1050, 22 FEP Cases 9 (E.D. Mo. 1979)

10) *Jefferson* v. *H.K. Porter Co.*, 485 F. Supp. 356, 22 FEP Cases 53 (N.D. Ala. 1980)

11) *Gay* v. *Waiters and Dairy Lunchmen's Union, Local No. 30*, 489 F. Supp. 282, 22 FEP Cases 281 (N.D. Cal. 1980)

12) *Satz* v. *I.T.T. Financial Corp.*, 464 F. Supp. 284, 22 FEP Cases 926 (E.D. Mo. 1980), *rev'd*, 619 F.2d. 738, 22 FEP Cases 929 (8th Cir. 1980)

13) *Claytor* v. *Howard University*, ____ F. Supp. ____, 22 FEP Cases 969 (D.D.C. 1978)

14) *Wooten* v. *N.Y. Telephone Co.*, 485 F. Supp. 748, 22 FEP Cases 1742 (S.D.N.Y. 1980)

E.

VOLUME 23

15) *Vinson* v. *Taylor*, ____ F. Supp. ____, 23 FEP Cases 37 (D.D.C. 1980)

16) *Harris* v. *Anaconda Aluminum Co.*, ____ F. Supp. ____, 23 FEP Cases 553 (N.D. Ga. 1979)

17) *Pettus* v. *Dow Badische Chemical Co.*, ____ F. Supp. ____, 23 FEP Cases 615 (S.D. Tex. 1980)

18) *Gupta* v. *International Business Machines Corp.*, ____ F. Supp. ____, 23 FEP Cases 857 (D. Md. 1980)

19) *Eng* v. *National Academy of Sciences*, ____ F. Supp. ____, 23 FEP Cases 862 (D.D.C. 1980)

20) *Fong* v. *American Airlines*, ____ F.2d ____, 23 FEP Cases 1168 (9th Cir. 1980)

21) *Schaulis* v. *CTB/McGraw Hill, Inc.*, ____ F. Supp. ____, 23 FEP Cases 1185 (N.D. Cal. 1980)

22) *Hernadez* v. *Western Electric Company, Inc.*, ____ F. Supp. ____, 23 FEP Cases 1244 (S.D. Tex. 1978)

23) *Panlilio* v. *Dallas Independent School District*, ____ F. Supp. ____, 23 FEP Cases 1573 (N.D. Tex. 1979)

24) *Gleiser* v. *Regents of the University of California*, ____ F. Supp. ____, 23 FEP Cases 1701 (N.D. Cal. 1980)

25) *Bronze Shields, Inc.* v. *New Jersey Department of Civil Service*, ____ F. Supp. ____, 23 FEP Cases 1720 (D.N.J. 1980)

II.

Decisions in Title VII and 42 U.S.C. § 1981 cases where the defendant has prevailed and federal courts have held that defendant is entitled to litigation costs.

A.

VOLUME 19

1) *Mixon* v. *Hanley Industries, Inc.*, 454 F. Supp. 386, 19 FEP Cases 38 (E.D. Mo. 1978), *aff'd.*, 594 F.2d 869, 22 FEP Cases 62 (8th Cir. 1979)

2) *Johnson* v. *Baylor College of Medicine*, ____ F. Supp. ____, 19 FEP Cases 165 (S.D. Tex. 1979)

3) *Rice* v. *City of St. Louis*, 464 F. Supp. 138, 19 FEP Cases 197 (E.D. Mo. 1978), *aff'd*., 607 F.2d 791, 21 FEP Cases 81 (8th Cir. 1979)

4) *Hunter* v. *Shell Oil Co.*, ____ F. Supp. ____, 19 FEP Cases 350 (S.D. Tex. 1979)

5) *Women Employed* v. *Rinella & Rinella*, 468 F. Supp. 1123, 19 FEP Cases 712 (N.D. Ill. 1979)

6) *Kelly* v. *Atlantic Richfield Co.*, 468 F. Supp. 712, 19 FEP Cases 823 (E.D. Tex. 1979)

7) *Lanigan* v. *Bartlett & Co. Grain*, 466 F. Supp. 1388, 19 FEP Cases 1039 (W.D. Mo. 1979)

8) *Anderson* v. *United States Steel Corp.*, ____ F. Supp. ____, 19 FEP Cases 1215 (N.D. Cal. 1979)

9) *McGee* v. *Stauffer Chemical Co.*, ____ F. Supp. ____, 19 FEP Cases 1292 (S.D. Tex. 1978)

10) *Rhoades* v. *Jim Dandy Co.*, ____ F. Supp. ____, 19 FEP Cases 1564 (N.D. Ala. 1978)

B.

VOLUME 20

11) *Brown* v. *General Motors Corp.*, ____ F. Supp. ____, 20 FEP Cases 88 (W.D. Mo. 1978), *Rev'd*. 601 F.2d 956, 20 FEP Cases 94 (8th Cir. 1979)

12) *McMillan* v. *Central Freight Lines, Inc.*, ____ F. Supp. ____, 20 FEP Cases 165 (N.D. Tex. 1979)

13) *Harris* v. *Ralston Purina*, 471 F. Supp. 405, 20 FEP Cases 166 (D. Col. 1979)

14) *Walker* v. *Xerox Corp.*, 472 F. Supp. 451, 20 FEP Cases 278 (E.D. Mo. 1979)

15) *Smith* v. *Amoco Chemicals Corp.*, ____ F. Supp. ____, 20 FEP Cases 724 (S.D. Tex. 1979)

16) *Hendricks* v. *Solomon*, 474 F. Supp. 280, 20 FEP Cases 1176 (E.D. Mo. 1979)

17) *Booth* v. *Board of Directors, National American Bank*, 475 F. Supp. 638, 20 FEP Cases 1270 (E.D. La. 1979)

18) *Wheeler* v. *Armco Steel Corp.*, 471 F. Supp. 1050, 20 FEP Cases 1594 (S.D. Tex. 1979)

19) *Edmondson* v. *United States Steel Corp.*, ____ F. Supp. ____, 20 FEP Cases 1745 (N.D. Ala. 1979)

C.

VOLUME 21

20) *Nellis* v. *Sunshine Dairy*, ____ F. Supp. ____, 21 FEP Cases 327 (D. Ore. 1979)

21) *Robinson* v. *E.I. duPont de Nemours & Co.*, ____ F. Supp. ____, 21 FEP Cases 373 (D.S.C. 1979)

22) *Neidhardt* v. *D.H. Holmes Co.*, ____ F. Supp. ____, 21 FEP Cases 452 (E.D. La. 1979)

23) *Holman* v. *Anchor Distributors, Inc.*, 472 F. Supp. 361, 21 FEP Cases 670 (E.D. Mo. 1979)

24) *E.E.O.C.* v. *Sheet Metal Workers, Local 122*, 463 F. Supp. 388, 21 FEP Cases 936 (D. Md. 1978)

25) *Bauernfeind* v. *Village Inn Pancake House, Inc.*, ____ F. Supp. ____, 21 FEP Cases 1003 (D. Colo. 1979)

D.

VOLUME 22

26) *Setser* v. *Novack Investment Co.*, 483 F. Supp. 1147, 22 FEP Cases 96 (E.D. Mo. 1980)

27) *Edwards* v. *I.T.T. American Electric*, ____ F. Supp. ____, 22 FEP Cases 107 (N.D. Miss. 1979)

28) *Owings* v. *City of Houston*, ____ F. Supp. ____, 22 FEP Cases 167 (S.D. Tex. 1979)

29) *Belgarde* v. *H.C. Smith Construction Co.*, 483 F. Supp. 1334, 22 FEP Cases 244 (D.N.D. 1980)

30) *Pegues* v. *Mississippi State Employment Service*, ____ F. Supp. ____, 22 FEP Cases 392 (N.D. Miss. 1980)

31) *Salge* v. *Silver Burdett Co.*, ____ F. Supp. ____, 22 FEP Cases 818 (S.D. Ind. 1980)

32) *Mosley* v. *St. Louis Southwestern Ry. Co.*, ____ F. Supp. ____, 22 FEP Cases 835 (E.D. Tex. 1980)

33) *Kirk* v. *Feld Truck Rental, Inc.*, ____ F. Supp. ____, 22 FEP Cases 843 (N.D. Ga. 1979)

34) *Rosser* v. *Laborers, Local 438*, ____ F. Supp. ____, 22 FEP Cases 1271 (N.D. Ga. 1978), *aff'd*, 616 F.2d. 221, 22 FEP Cases 1274 (5th Cir. 1980)

35) *Wright* v. *Allis-Chalmers*, ____ F. Supp. ____, 22 FEP Cases 1303 (N.D. Ala. 1980)

36) *Smith* v. *Bailar*, ____ F. Supp. ____, 22 FEP Cases 1378 (N.D. Ga. 1980)

37) *Joshi* v. *Florida State University*, 486 F. Supp. 86, 22 FEP Cases 1533 (N.D. Fla. 1980)

38) *E.E.O.C.* v. *Oklahoma Packers Hide Co.*, ____ F. Supp. ____, 22 FEP Cases 1547 (W.D. Okla. 1980)

39) *Underwood* v. *Jefferson Memorial Hospital*, 484 F. Supp. 1040, 22 FEP Cases 1641 (E.D. Mo. 1980)

40) *Ragan* v. *Portland Superintending School Committee*, ____ F. Supp. ____, 22 FEP Cases 1768 (D. Me. 1979)

41) *Curran* v. *Portland Superintending School Committee*, ____ F. Supp. ____, 22 FEP Cases 1777 (D. Me. 1979)

42) *Lacy* v. *Chrysler Corp.*, ____ F. Supp. ____, 22 FEP Cases 1825 (E.D. Mo. 1980)

43) *Heyman* v. *Tetra Plastics, Inc.*, 482 F. Supp. 510, 22 FEP Cases 1829 (E.D. Mo. 1979)

E.

VOLUME 23

44) *Garcia* v. *Rush-Presbyterian-St. Luke's Medical Center*, ____ F. Supp. ____, 23 FEP Cases 177 (N.D. Ill. 1980)

45) *Carroll* v. *United Steelworkers of America, AFL-CIO*, ____ F. Supp. ____, 23 FEP Cases 238 (D. Md. 1980)

46) *Greene* v. *Associated Air Freight, Inc.*, ____ F. Supp. ____, 23 FEP Cases 544 (E.D. Ky. 1980)

47) *Patterson* v. *General Motors Corp.*, ____ F. Supp. ____, 23 FEP Cases 888 (N.D. Ill. 1978), *aff'd* ____ F.2d. ____, 23 FEP Cases 894 (7th Cir. 1980)

48) *Alpa* v. *Western Air Lines*, ____ F. Supp. ____, 23 FEP Cases 1042 (N.D. Cal. 1979)

49) *Buckner* v. *Cameron Iron Works, Inc.*, ____ F. Supp. ____, 23 FEP Cases 1092 (S.D. Tex. 1979)

50) *Tortorici* v. *Secretary of Health, Education, and Welfare*, ____ F. Supp. ____, 23 FEP Cases 1284 (N.D. Ala. 1979)

51) *Boulden* v. *Bolger*, ____ F. Supp. ____, 23 FEP Cases 1491 (D.N.J. 1980)

52) *Laborde* v. *Regents of the University of California*, ____ F. Supp. ____, 23 FEP Cases 1661 (C.D. Cal. 1980)

III.

Decisions in Title VII and 42 U.S.C. § 1981 cases where the defendant has prevailed and federal courts have awarded both attorney's fees and costs to defendant.

A.

VOLUME 19

1) *Brown* v. *Lakeside Country Club*, ____F.Supp. ____, 19 FEP Cases 796 (S.D. Tex. 1979)

2) *Davis* v. *Braniff Airways, Inc.* 468 F.Supp. 10, 19 FEP Cases 811 (N.D. Tex. 1979)

3) *Moss* v. *ITT Continental Baking Co.*, 468 F.Supp. 420, 19 FEP Cases 861 (E.D. Va. 1979)

4) *Bowers* v. *Kraft Foods Corp.*, 467 F.Supp. 971, 19 FEP Cases 934 (E.D. Mo. 1979)

B.

VOLUME 20

5) *Wheeler* v. *Anchor Continental, Inc.* ____ F.Supp. ____, 20 FEP Cases 591 (D.S.C. 1978)

6) *Miller* v. *Andrews Bearing Corp.*, ____F.Supp. ____, 20 FEP Cases 635 (D.S.C. 1979)

7) *Faraci* v. *Hickey-Freeman, Inc.*, 607 F.2d 1025, 20 FEP Cases 1777 (2d Cir. 1979)

8) *Johnson* v. *Weed Eaters*, ____ F. Supp. ____, 20 FEP Cases 1782 (S.D. Tex. 1979)

C.

VOLUME 21

9) *Flora* v. *Moore*, 461 F.Supp. 1104, 21 FEP Cases 298 (N.D. Miss. 1978)

10) *EEOC* v. *American National Bank*, ____F.Supp. ____, 21 FEP Cases 1595 (E.D.Va. 1979)

D.

VOLUME 22

11) *Jeremiah* v. *United Technologies Corp.*, ____ F.Supp.____ 22 FEP Cases 152 (D. Conn. 1980)

12) *EEOC* v. *First National Bank of Jackson*, ____ F.Supp.____, 22 FEP Cases 696 (S.D. Miss. 1978)

13) *EEOC* v. *Brookhaven Bank & Trust Co.*, ____ F.Supp.____, 22 FEP Cases 699 (S.D. Miss. 1978), *rev'd*, 614 F.2d 1022, 22 FEP Cases 703 (5th Cir. 1980)

14) *Obin* v. *District No. 9, International Association of Machinists and Aerospace Workers*, 487 F.Supp. 368, 22 FEP Cases 815 (E.D. Mo. 1980)

15) *Fisher* v. *Fashion Institute of Technology*, ____ F.Supp.____, 22 FEP Cases 1163 (S.D.N.Y. 1980)

16) *Harris* v. *Plastics Manufacturing Co.*, 617 F.2d 438, 22 FEP Cases 1536 (5th Cir. 1980)

E.

VOLUME 23

17) *Reed* v. *Sisters of Charity of the Incarnate World of Louisiana, Inc.*, ____F.Supp.____, 23 FEP Cases 1171 (W.D. La. 1978)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOROTHY DUAL, *Plaintiff*	Civil Action No. 76-0015
MAX CLELAND, *Defendant*	

MOTION TO AMEND JUDGMENT TO AWARD COSTS TO DEFENDANT

Pursuant to Rules 59 and 68, Federal Rules of Civil Procedure, defendant respectfully moves this Court to amend its Order of July 25, 1977, so as to provide that plaintiff shall pay to defendant his costs which were incurred after May 24, 1978, the date on which defendant made a settlement "offer of judgment" which included a cash payment to plaintiff, which plaintiff rejected.

In support of this motion, defendant submits herewith a memorandum of points and authorities and a proposed order.

Respectfully submitted,

EARL J. SILBERT
Earl J. Silbert
United States Attorney

ROBERT N. FORD
Robert N. Ford
Assistant United States Attorney

KAREN I. WARD
Karen I. Ward
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Motion To Amend Judgment To Award Costs To Defendant, memorandum of points and authorities in support and proposed order has been made, this 2nd day of August, 1978, upon counsel for plaintiff, by mailing a copy thereof to:

Gary H. Simpson, Esquire
4720 Montgomery Avenue
Suite 407
Bethesda, Maryland 20014

KAREN I. WARD
Karen I. Ward
Assistant United States Attorney
U.S. Courthouse
Room 3431
Washington, D.C. 20001
(202) 426-7121

Attorney for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOROTHY BEAL, *Plaintiff*,
v.
MAX CLELAND, *Defendant*.
Civil Action No. 76-0015

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO AMEND ORDER AND AWARD COSTS

This matter came on for trial on plaintiff's claims of discrimination and reprisal under 42 U.S.C. § 2000e-16. A final judgment was entered in favor of defendant on July 25, 1978.

In an effort to resolve this dispute involving a former federal employee and cognizant of litigation risks inherent in every case where significant credibility issues are present, defendant made a settlement offer to plaintiff. The settlement offer was ultimately made in the form of an offer of judgment pursuant to Rule 68, Federal Rules of Civil Procedure and was served on May 24, 1978. Trial commenced on June 5, 1978. While the precise details of the offer need not be set forth here, it is undisputed that the offer of judgment included some relief *i.e.* money to be paid to the plaintiff—and plaintiff ultimately received no relief.[12]

[12] To preserve the confidentiality of settlement negotiations, defendant has not, by agreement of plaintiff's counsel, attached the offer or described its exact terms. It is defendant's understanding (from a telephone conversation with plaintiff's counsel) that plaintiff will stipulate that the offer of judgment was made more than ten (10) days before trial and that it was more favorable than that ultimately received by plaintiff in the action. If this stipulation is not forthcoming, defendant will submit a copy of the offer to the Court in support of this motion.

Rule 68, Federal Rules of Civil Procedure, provides that:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued .... An offer not accepted shall be deemed withdrawn .... If the judgment finally obtained by the offeree is not more than the offer, the offeree *must* pay the costs incurred after the making of the offer.

Defendant incurred the expense of witness travel and *per diem* after the offer. While defendant has not yet calculated the amount of costs,[13] defendant submits its entitlement to costs is clear under Rule 68.

WHEREFORE, it is respectfully requested that this Court amend its July 25, 1978, Order to award costs to defendant in an amount to be set by subsequent court order or agreement.

Respectfully submitted,

EARL J. SILBERT
Earl J. Silbert
United States Attorney

ROBERT N. FORD
Robert N. Ford
Assistant United States Attorney

KAREN I. WARD
Karen I. Ward
Assistant United States Attorney

[13] Defendant believed this motion to be governed by Rule 59, F.R.C.P. since the costs determination was part of the final order. Consequently, this motion was due within 10 days, and defendant has been unable to compute costs yet.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOROTHY DUAL, *Plaintiff*	Civil Action No. 76-0005
v.	
MAX CLELAND, *Defendant.*	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION UNDER RULE 59(e) TO MODIFY

The Defendant has filed a Motion under Federal Rules of Civil Procedure 59(e) to Modify this Court's Judgment to cause the costs of this proceeding be assessed against the Plaintiff. This Motion is specifically designed to cause these costs incurred by the Defendant after its Offer of Judgment under Rule 68 to be assessed against the Plaintiff.

The Plaintiff submits that such a modification would not be in the best interest of justice. She had a good faith claim (specifically as it related to retaliation) and incurred great expenses on her own in pursuing this matter.

GARY HOWARD SIMPSON

Gary Howard Simpson
Attorney for Plaintiff
4720 Montgomery Lane, Suite 407
Bethesda, Maryland 20014
Telephone: (301) 656-7013

POINTS AND AUTHORITIES

Rule 59(e), Federal Rules of Civil Procedure

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of August, 1978, a copy of the foregoing Opposition was mailed via ordinary mail, postage prepaid, addressed to Earl J. Silbert, Esq., U.S. Attorney, Robert N. Ford, Esq., Assistant U.S. Attorney and Karen I Ward, Esq., Assistant U.S. Attorney, U.S. Courthouse, Room 3431, Washington, D.C. 20001.

GARY HOWARD SIMPSON

Gary Howard Simpson

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
536 SOUTH CLARK STREET
CHICAGO, ILLINOIS 60605
TELEPHONE: 353-2713

IN REPLY REF

SETTLEMENT AGREEMENT

1. In exchange for the promises made by contained in paragraph (2) of this Agreement, agrees not to institute a lawsuit under Title VII of the Civil Rights Act of 1964 based on Charge Number filed with the Equal Employment Opportunity Commission, and the Equal Employment Opportunity Commission agrees not to use this charge as the jurisdictional basis for a civil action under Section 706(f)(1) of Title VII.

2. In exchange for the promises of and the Equal Employment Opportunity Commission contained in paragraph (1) of this agreement, the agrees:

3. This agreement constitutes the complete understanding between the Respondent, Charging Party and the Equal Employment Opportunity Commission. No other promises or agreements shall be binding unless signed by these parties.

4. It is understood that this agreement does not constitute an admission by the Respondent of any violation of Title VII of the Civil Rights Act.

5. The Respondent agrees to provide written notice to the EOS, of the Chicago District Office within 10 days of satisfying each obligation specified at paragraph (2) of this agreement.

6. These parties agree that this agreement may be used as evidence in a subsequent proceeding in which any of the parties allege a breach of this agreement.

7. The Equal Employment Opportunity Commission's participation in this agreement does not reflect any judgment by the Commission on the merits of the charge. Furthermore, the Equal Employment Commission does not waive or in any manner limit its right to process or seek relief in any other charge, including but not limited to a charge filed by a member of the Commission against the Respondent.

_____ _____
Respondent

_____ _____
Charging Party

On behalf of the Commission:

_____ _____
Acting Director
Chicago District Office

END OF CASE